Supreme Court
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No. 06-

IN THE

Supreme Court of the United States

NUCOR CORPORATION,
CASEY EQUIPMENT CORPORATION and
GADSDEN INDUSTRIAL PARK, LLC,

Petitioners,

v.

GULF STATES REORGANIZATION GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners purchased, and later resold at a substantial profit, certain physical assets of a long-defunct steel mill at an auction conducted by a Chapter 7 Trustee under bankruptcy court supervision. Respondent also participated in the auction and was financially able, although unwilling, to outbid Petitioners. Claiming that it would have used the dormant assets to enter the steel business in competition with one of the Petitioners, which allegedly had a dominant downstream market position, Respondent brought a private antitrust action seeking three times its hypothetical lost future profits. The Eleventh Circuit, reversing a summary judgment for Petitioners, held that Respondent had adequately alleged conduct supporting an antitrust violation and was injured "by reason of" the alleged violation. The questions presented are:

I. Whether, after this Court's decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, an antitrust claim may be premised on non-predatory bidding in a Chapter 7 bankruptcy auction of long-dormant physical assets?

II. Whether "but for" causality can satisfy the "by reason of" requirement of Clayton Act § 4, and the standards of *Associated General Contractors of California v. California State Counsel of Carpenters*, when an antitrust plaintiff's failure to submit a qualified competitive bid in the auction caused its alleged injury?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the appellate proceeding in the Eleventh Circuit, whose judgment is sought to be reviewed:

A. Petitioners

Nucor Corporation
Casey Equipment Corporation
Gadsden Industrial Park, LLC

B. Respondent

Gulf States Reorganization Group, Inc.

CORPORATE DISCLOSURE STATEMENT

Each of the Petitioners has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on October 5, 2006; is reported at 466 F.3d 961; and is reproduced in the Appendix ("App.") at 1a-16a. The Memorandum Opinion of the United States District Court for the Northern District of Alabama, Eastern Division granting Petitioners' motion for summary judgment and dismissing Respondent's complaint with prejudice was issued on September 30, 2005 (No. 1:02-cv-2600-RDP); and is reproduced at App. 17a-56a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on October 5, 2006, and a timely petition for panel rehearing and rehearing en banc was denied January 17, 2007, App. 98a-99a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...

Section 4 of the Clayton Act, 15 U.S.C. § 15:

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in [federal court] . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. § 18:

> [N]o person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

INTRODUCTION

This case, decided before this Term's decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007), stands at the intersection of bankruptcy and antitrust law. The Eleventh Circuit's decision raises the important question whether the allegedly dominant position of one Petitioner in a downstream market permitted Petitioners' upstream acquisition of defunct steel assets at a non-predatory price in a Chapter 7 bankruptcy liquidation auction to be treated as a horizontal acquisition "of the assets of another person engaged also in commerce" under Section 7 of the Clayton Act. 15 U.S.C. § 18. Reversing a district court summary judgment for Petitioners, the Eleventh Circuit held Clayton Act § 7 sufficiently implicated to render Petitioners' highly profitable acquisition and resale of the assets anticompetitive conduct. That decision mischaracterizes the bankruptcy process and imposes the same kind of constraint on non-predatory bidding in an upstream market that this Court recently rejected in *Weyerhaeuser*. For that reason alone, this Court should grant *certiorari* and reinstate summary judgment or, at the very minimum, vacate and remand the Eleventh Circuit's decision for further consideration in light of *Weyerhaeuser*.

This case also raises critical issues under the injury "by reason of" prerequisite to maintaining a private antitrust action under Section 4 of the Clayton Act. *See* 15 U.S.C. § 15. This Court dealt with that provision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), but has not addressed it since 1983. Placing itself in direct conflict with a number of other circuits, the Eleventh Circuit

held that minimal "but for" causality, rather than "proximate cause," is sufficient to maintain a Clayton Act § 4 action. It gave no weight to undisputed evidence that the sole cause of Respondent's inability to acquire the defunct assets was Respondent's own unwillingness to pay more than a bargain basement cash price and to comply with the procedures of the bankruptcy auction.

By granting *certiorari*, this Court can eliminate a split in the circuits by confirming that proximate, rather than merely "but for," causation is a necessary element of a private antitrust claim and requires evaluation of superseding cause as found by the district court. It can further confirm that "antitrust injury" must arise from an unlawful element of defendant's conduct rather than, as here, from non-predatory buying competition of a kind that Respondent would have faced in any well-functioning market. In so doing, the Court can eliminate confusion among the circuits regarding "antitrust standing," reinstate reasonable boundaries on Clayton Act § 4 actions, and prevent disappointed would-be competitors from seeking success in the courts rather than the marketplace.

STATEMENT

Respondent brought this case under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleging violations of Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. Respondent's claims arose from its failure to acquire certain dormant assets of Gulf States Steel, Inc. in a trustee's auction conducted under Chapter 7 of the Bankruptcy Code.

Prior to 1999, Gulf States Steel, Inc. of Alabama ("Gulf States Steel") owned and operated a steel plant in Gadsden, Alabama. On July 1, 1999, Gulf States Steel filed for reorganization protection under Chapter 11 of the U.S. Bankruptcy Code. The reorganization effort was not successful and Gulf States Steel shut down its Gadsden operations in August of 2000. On November 14, 2000, the bankruptcy court converted the Gulf States Steel proceeding to a Chapter 7 liquidation. Respondent was formed by a group of investors on January 26, 2001 as a vehicle to attempt to purchase certain Gulf States Steel assets from the bankrupt estate with the alleged purpose of reopening the plant.

As part of the preparation for the Chapter 11 reorganization filing, an independent appraiser determined that the steel plant assets at issue in this case ("the Assets") had an "orderly liquidation value" of approximately $19.8 million.[1] App. 27a. Respondent's own internal analyses assigned the Assets a book value of at least $13.3 million and Respondent repeatedly represented to potential investors that the value of the Assets was some $19-22 million.

1. According to the Valuation Report, this was "[t]he estimated gross amount expressed in terms of money which could be typically realized from a sale, given a reasonable period of time to find a purchaser(s), the seller being compelled to sell on an as is-where is basis." App. 20a.

The Assets were initially offered for sale by the Chapter 7 Trustee at a public bankruptcy auction in May 2001. Respondent participated in that auction. The Assets, however, were unsold because neither Respondent nor other potential bidders would meet the reserve price of $7.1 million for certain key assets.

Thereafter, continuing into 2002, Respondent conducted private negotiations with the bankruptcy Trustee for the purchase of the Assets. In June 2002, Respondent entered a "stalking horse" contract with the Trustee to purchase the Assets for $5 million, which would be entirely funded by a non-recourse loan from the local Industrial Development Authority. To justify the low $5 million purchase price, Respondent's representative testified before the bankruptcy court that "the value of this property is depressed by an oversupply of this property." App. 28a. The bankruptcy court then issued an order permitting the Assets to be sold to Respondent unless another party made a higher bid, in which case a second public auction would be held.

The bankruptcy court order came to the attention of Petitioners Casey Equipment Corporation ("Casey") and Nucor Corporation ("Nucor"). Nucor manufactures various steel products and also purchases and sells steel-related equipment in the used capital asset market. Casey is in the business of buying and selling used steel-related assets and developing industrial parks. Casey and Nucor had a longstanding relationship in buying and selling used steel-related equipment. App. 3a.

Casey's Chairman was very familiar with the Gulf States Steel bankruptcy proceeding and advised Nucor that the Assets subject to Respondent's "stalking horse" contract were

worth substantially more than $5 million. Casey and Nucor agreed that Casey would form Petitioner Gadsden Industrial Park, LLC ("Park") to bid for the Assets and resell them. Nucor would provide financial support for the bid up to a maximum of $8 million, secured by the assets. App. 31a. Casey would manage the resale of the more significant physical assets, focusing on the export Asian market which was very "hot" at that time, and would develop the real property at the Gulf States Steel site into an industrial park at its own expense.

On September 12, 2002, Park bid $5.25 million for the Assets, thereby triggering the court-supervised bankruptcy auction. Because it believed that Nucor had a dominant position in the downstream hot rolled coil steel market and should not be permitted to participate, Respondent contacted the Federal Trade Commission ("FTC"), but the FTC did not take any action. The bankruptcy auction was held on September 16, 2002.[2] *See* App. 24a. After some twenty-two back and forth bids by Park and Respondent, Park's final bid for the Assets was $6.3 million in cash. Respondent, an estate creditor, then submitted a part cash/part debt forgiveness bid of $7 million, despite legal advice that only an all cash bid would be allowed. *See* App. 25a. The Trustee rejected Respondent's bid, but gave it extra time to make an all cash bid that would comply with the auction rules. App. 25a. Respondent refused to submit any further bid, even though it was financially capable of making a higher cash

2. One other potential bidder, the Italian steel firm Palini é Bertoli, had expressed interest in purchasing the Assets during the preceding months. However, Respondent and Palini é Bertoli met and discussed their bidding strategies before the auction, including the idea that competing bids in excess of $5 million would not be in either party's interest. Thereafter, Palini é Bertoli did not bid. App. 23a-24a.

bid and, indeed, of overbidding Park's $8 million limit. As a result, Park's bid of $6.3 was accepted by the Trustee. App. 25a.

After the auction, the bankruptcy court held a hearing to consider Respondent's challenge to the result. On September 27, 2002, the bankruptcy court issued a written order approving the sale of the Assets to Park. App. 57a-97a. The court's order found that the Assets were "properly exposed to the marketplace thereby allowing maximization of interest in bidding on the assets." App. 89a. The bankruptcy court further found that "there was no collusion or bad faith motive on the part of the Trustee or any bidder"; that "all negotiations and bidding occurred at arms length"; and that "the Trustee's decision to accept the higher and better bid of Park is consistent with sound business judgment, and is due to be approved." App. 89a, 94a. Respondent did not appeal the bankruptcy court's order and Park acquired the Assets.

In July and August of 2003, Casey arranged for the resale of the majority of the Assets to purchasers in Asia for approximately $18 million. Park retained the real property acquired at the bankruptcy auction and developed it into a successful industrial park.

Respondent brought this action in the Northern District of Alabama on October 23, 2002. App. 4a. The district court allowed the parties to conduct full factual discovery concerning certain threshold issues raised by Respondent's claim for treble damages under Section 4 of the Clayton Act. This discovery generated an extensive record of undisputed "Admitted Facts" that are set forth in the district court's opinion. App. 19a-34a. Based on these undisputed facts, the district court granted summary judgment in favor of Nucor,

Casey and Park on three independent, alternative grounds: (1) lack of proximate causation, App. 36a-45a; (2) lack of "antitrust injury" and standing, App. 45a-48a; and (3) the absence of any anticompetitive conduct in Petitioners' non-predatory bidding, App. 48a-55a.

Respondent appealed to the Eleventh Circuit which reversed the district court's rulings on proximate cause and antitrust injury and vacated its holding on anticompetitive conduct. The Eleventh Circuit did not question the undisputed material facts set forth in the district court's opinion. App. 2a-4a. Rather, it reached different legal conclusions on the same fact base.

The Eleventh Circuit treated the issue of causality solely as one of constitutional standing rather than "proximate causation." App. 5a. Applying the Article III standing test of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the court found a "causal connection" between Petitioners' participation in the auction and Respondent's "failure to win." App. 5a. The court acknowledged "that [Respondent] could have prevailed had it submitted a higher cash bid," but discounted that superseding fact because Petitioners' activity made it "improper to regard [Respondent's] injury as entirely self-caused." App. 6a.

Turning to "antitrust injury," the court restated the "precise violation asserted" as arising under Section 7 of the Clayton Act rather than the Sherman Act violations claimed by Respondent. App. 7a. It then held that Respondent's allegations of Nucor's market power, if proven, would preclude Park from bidding against Respondent and thus preventing Respondent from entering the downstream market using the dormant Assets. App. 9a-10a. Because this alleged

exclusion might injure downstream consumers, the court found Respondent's injury "inseparable from the alleged harm to competition" and "injury of the type against which the antitrust laws are designed to protect." App. 10a-11a. The court gave no weight to the district court's and bankruptcy court's findings of non-predatory bidding. In its view, Petitioners "did not increase competition in the relevant market," App. 12a, which, under its Clayton Act § 7 theory, the court concluded was the downstream steel product market.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted So That The Court's Controlling Decision In *Weyerhaeuser* Can Be Applied In This Case

The Eleventh Circuit's decision in this case issued approximately four months before this Court issued its unanimous decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007). The Sherman Act issues in this case so closely resemble those in *Weyerhaeuser*, and the result below so fundamentally departs from the teaching of *Weyerhaeuser*, that *certiorari* is essential so that *Weyerhaeuser* can be applied. This Court should either reverse the Eleventh Circuit's decision summarily and reinstate the judgment entered by the district court or, at a minimum, vacate the court of appeals' decision and remand this case for further proceedings not inconsistent with *Weyerhaeuser*.

The essence of Respondent's claim is that Petitioners' successful upstream bidding for dormant steel mill assets in a bankruptcy auction precluded Respondent from purchasing those particular assets and competing with Petitioner Nucor in the downstream market for hot rolled coil steel. The

essence of the claim before the Court in *Weyerhaeuser* was remarkably similar. Ross-Simmons charged Weyerhaeuser with acquiring upstream sawlogs at prices that prevented Ross-Simmons from acquiring the input assets necessary to meaningfully compete in the downstream market for finished hardwood lumber. In both cases, the successful upstream bidder was alleged to have had a dominant market position and to have eliminated a downstream competitor by reason of its upstream purchasing.

Weyerhaeuser determined that establishing a Sherman Act violation based on upstream purchasing activity required proof of two critical elements: (1) upstream purchases at a "predatory" price – *i.e.*, a price that forced a business loss on the purchaser; and (2) a dangerous probability that the defendant's loss would be recouped in later transactions at the expense of other market participants. 127 S. Ct. at 1074-75. This Court placed particular emphasis on the requirement of "predatory" bidding because "[g]iven the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behavior with too lax a liability standard is as serious here as it was in [a predatory downstream pricing situation] in *Brooke*." *Id.* at 1078 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)). Because Ross-Simmons had not met the two-pronged test established by the Court, its damage award was vacated.

Respondent's claim must fail on the same basis as Ross-Simmons's claim in *Weyerhaeuser*. The district court here, after full discovery on the pertinent issues, found it undisputed that Petitioners' auction bids were economically reasonable and, far from forcing a business loss, were intended to generate and did generate a huge resale profit.

App. 55a ("[Petitioners] took no wrongful actions, but merely submitted an objectively reasonable bid in a court-supervised bankruptcy auction."); App. 33a (Petitioners realized a profit of almost $12 million on resale of assets purchased for $6.3 million); App. 51a n.23 ("There is no allegation here that Park's bid was predatory, or involved 'the immediate sacrifice of profits through unreasonable' prices or actions."). In fact, the evidence conclusively showed that Petitioners had agreed to "cap" their bidding to ensure that the acquired Assets could be resold without loss. App. 32a (noting that Petitioners capped their bid at a price equal to the estimated salvage/scrap value of the assets). Thus, Respondent's case clearly fails the first prong of the *Weyerhaeuser* test and the Eleventh Circuit's decision cannot be permitted to stand. At a minimum, *certiorari* should be granted, the Eleventh Circuit's decision vacated, and the case remanded for further proceedings not inconsistent with *Weyerhaeuser*.

II. Certiorari Should Be Granted To Resolve The Application Of The Antitrust Laws To Chapter Seven Bankruptcy Acquisitions

The Eleventh Circuit avoided any analysis of whether the upstream input asset purchases at issue could be anticompetitive acts by focusing its review exclusively on an alleged downstream market: "the Southeastern retail market for hot rolled coil .. . steel used for items such as highway railings and gas canisters." App. 1a-2a. To do so, it characterized Petitioners' activity as "an asset acquisition, thus implicating Section 7 of the Clayton Act." App. 7a. Without deciding whether a Section 7 violation had occurred, App. 10a, the Eleventh Circuit majority held that Respondent had implicitly claimed one and properly linked its alleged

antitrust injury to it, App. 11a-12a. This analysis distorts the plain language and policy of both the antitrust laws and the Bankruptcy Code. Unless reviewed and reversed, it will invite an unnecessary impairment of creditor rights in Chapter 7 bankruptcy liquidations and an evasion of *Weyerhaeuser*.

The assets on which Petitioners bid were owned and operated by Gulf States Steel until July 1, 1999 when Gulf States Steel sought bankruptcy protection under Chapter 11 of the Bankruptcy Code. Commencing July 1, 1999, Gulf States Steel became debtor-in-possession and continued to operate the steel mill until August 2000 when all production ceased. On November 14, 2000, the bankruptcy court concluded that Gulf States Steel could not be successfully reorganized and converted the bankruptcy proceeding into a Chapter 7 liquidation. Pursuant to this decision, control of the debtor's estate, including the physical steel mill assets at issue, passed to a court-appointed trustee. *See Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1107 (2007) ("Under Chapter 7 the debtor's non-exempt assets are controlled by the bankruptcy trustee."). Gulf States Steel lost all further legal right to the assets. *Lamie v. U.S. Trustee*, 540 U.S. 526, 532 (2004) (noting that upon court's approval converting bankruptcy action from Chapter 11 to Chapter 7, trustee's appointment "terminated [debtor's] status as debtor-in-possession").

In order to find that Clayton Act § 7 was "implicated" by Petitioners' purchase of the defunct assets two years later, the Eleventh Circuit simply ignored the statutory language and relevant bankruptcy law considerations. Section 7, by its plain words, applies to one person's acquisition of "the assets of *another person engaged also in commerce*."

15 U.S.C. § 18 (emphasis added).[3] The Gulf States Steel assets, at the time of purchase in September 2002, had been dormant for two years and were assets of the bankruptcy trustee, a person clearly *not engaged in producing hot rolled coil steel or, in fact, in any active commerce*. Thus, the Eleventh Circuit's conclusion that Petitioners should be treated as acquirers in a horizontal hot rolled coil steel asset merger under Clayton Act § 7 cannot be squared with either the language of the statute or the provisions of the Bankruptcy Code vesting control of the assets in the Trustee, and must be reversed.

The problems of the Eleventh Circuit's analytical error are not merely conceptual. A Chapter 7 trustee's most important responsibility is to maximize the liquidation value of the bankrupt estate's assets for the benefit of its unpaid creditors. 6 Collier on Bankruptcy ¶ 704.02 (15th ed. rev.

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3. When it amended Clayton Act § 7 in 1950 to cover asset acquisitions, Congress made clear that the section "does not apply in bankruptcy or receivership cases." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 7 (1950). Research has found no reported case in which Clayton Act § 7 has been applied to the purchase of long-dormant physical assets at a Chapter 7 bankruptcy auction. *Dr. Pepper/Seven-Up Companies, Inc. v. FTC*, 991 F.2d 859 (D.C. Cir. 1993), referenced by the Eleventh Circuit as "discussing a soda company's purchase of a bottler's assets in a bankruptcy auction," App. 8a n.2, is not to the contrary. That case involved a violation of an FTC consent order, not application of Clayton Act § 7, and the assets at issue were still an operating business at the time of the bankruptcy sale. 991 F.2d at 863 ("[T]he FTC's disposition of this matter was not governed by the Clayton or FTC Acts, but by FTC regulations . . . ."); *see Dr. Pepper/Seven-Up Companies, Inc. v. FTC*, 798 F. Supp. 762, 765-66 (D.D.C. 1992) (involving Chapter 11 proceeding during which bottler continued to operate), *aff'd in part, rev'd in part*, 991 F.2d 859 (D.C. Cir. 1993).

2006) ("[I]t is the trustee's duty to both the debtor and the creditor to realize from the estate all that is possible for distribution among the creditors."); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) ("The trustee is 'accountable for all property received, and has the duty to maximize the value of the estate.'"). Past competitors of the bankrupt are often, as here, most aware of the true value of dormant assets or most in need of them for legitimate business purposes. The Eleventh Circuit's decision, in treating purchases by competitors of defunct bankruptcy assets as horizontal asset acquisitions subject to Clayton Act § 7, deters competitor participation in bankruptcy auctions to the detriment of the creditors the Bankruptcy Code is designed to protect. Moreover, the Eleventh Circuit's further conclusion that a "preferred purchaser" doctrine should apply to such auctions, thereby foreclosing existing, allegedly dominant, competitors from bidding at any price against those claiming to be potential entrants in a downstream market, exacerbates the problem. App. 8a.[4] That restriction would effectively bar prior competitors from

4. The "preferred purchaser" doctrine is an Antitrust Division policy that operates within the "failing company" defense context. A merger involving an entity not yet in bankruptcy, but inevitably headed toward bankruptcy, may not be challenged under Clayton Act § 7 where the proposed acquisition is the only alternative to bankruptcy because future competition would be the same under the acquisition and bankruptcy scenarios (*i.e.*, the "failing company" would be out of the market). If, however, there is a purchaser who can continue the business, the "failing company" defense becomes unavailable and that purchaser is deemed "preferred." *See* U.S. Dep't of Justice and FTC, *Horizontal Merger Guidelines*, § 5 (rev. Apr. 8, 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm. The "failing company" defense has no applicability in situations where a Chapter 7 bankruptcy liquidation is already in progress and competition no longer arises from the dormant assets.

participating in liquidation auctions or other sales of non-producing assets, no matter how unreasonably low a putative entrant might bid. It inevitably would lead to the type of "false positive" exclusion from the upstream market that this Court was at pains to foreclose in *Weyerhaeuser*. 127 S. Ct. at 1078. The deterrent effect is particularly troublesome because the Eleventh Circuit's opinion could be read to make participation in the bidding process, even if unsuccessful, a violation entitling the "preferred purchaser" to damages measured by its need to pay fair market value rather than a non-competitive bargain price.

If the decision below is permitted to stand, antitrust plaintiffs in the position of Ross-Simmons may simply avoid claims relating to the upstream market and recast their pleadings to allege that the exclusionary effect of defendant's upstream purchases in the downstream market "implicates" Clayton Act § 7. The two-pronged predation test developed in *Weyerhaeuser* would then be superseded by a hypothetical analysis which assumes that defendant "acquired" any competitor claiming, like Ross-Simmons, to have been excluded from the downstream market by defendant's upstream purchases. That is precisely the syllogism invoked by the Eleventh Circuit to sustain Respondent's complaint when the defunct assets had not been used in commerce for more than two years prior to the auction and Respondent claimed only that its possible future entry into the downstream market using the defunct assets had been foreclosed by its failure to win the bidding. This Court should not stand by and see its teaching in *Weyerhaeuser* and its concern for the protection of competition in upstream markets reduced to an artful pleading requirement.

III. Certiorari Should Be Granted To Eliminate A Conflict Among The Circuits Regarding The "By Reason Of" Antitrust Standing Requirement In Clayton Act § 4

Section 4 of the Clayton Act provides a private treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). In *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), this Court discussed a number of factors, including "proximate cause" and "antitrust injury," that need to be evaluated in determining whether an antitrust plaintiff had sufficiently alleged or proven the necessary connection between claimed injury and asserted antitrust violation. Thereafter, the various circuits have struggled both with the precise application of the *AGC* factors and, more fundamentally, with the question of which of these factors is necessary and/or sufficient to support a Clayton Act § 4 action. *See, e.g., Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 436-44 (2d Cir. 2005) (focusing on initial "four factors" articulated in Areeda, et al., treatise, examining "antitrust injury" as a "necessary, but not always sufficient" prerequisite, and evaluating four "other" factors under the rubric of "efficient enforcer"); *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 715-19 (7th Cir. 2006) (treating "antitrust injury" and "antitrust standing" as independent requirements and evaluating the latter requirement based on a balancing of "six factors" derived from *AGC*); *2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 738-43 (3d Cir. 2004) (analyzing "antitrust injury" as a necessary but insufficient condition of antitrust standing, followed by a "balancing test" of five "factors" synthesized from *AGC*); *Kloth v. Microsoft*

Corp., 444 F.3d 312, 323-25 (4th Cir. 2006) ("antitrust standing" requires a showing of "direct antitrust-type injury" to be determined based on consideration of "five factors," including causal connection, directness of injury, existence of more direct victims, problems of identifying and apportioning damages, as well as *Brunswick* "antitrust injury"); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 701-05 (9th Cir. 2001) (applying "three-factor test" to determine "proximate causation" and treating "antitrust injury" as a "second, independent ground" for dismissing private treble damage claim).

The Eleventh Circuit addressed the "causation" and "antitrust injury" elements of *AGC*. Its decision, as shown below, misstates both of those factors, is in conflict with better-reasoned decisions in other circuits and affords this Court an opportunity to clarify these critical factors and their proper role in the *AGC* analysis in an undisputed factual setting. *Certiorari* would permit this Court to give guidance on how these factors serve as "essential" elements within the overall *AGC* framework and to assist the lower courts in harmonizing their now-conflicting *AGC* standards.

A. The Eleventh Circuit Improperly Confused "Proximate Cause" And "Causal Connection."

The Eleventh Circuit restated the test of causality under Clayton Act § 4 as one only of Article III constitutional standing. App. 5a. In its view, based on *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), a non-antitrust case, "a causal connection between the injury and the conduct complained of" was sufficient to meet Section 4's "by reason of" standard. App. 5a-6a. This position conflicts with the views of the Seventh, Eighth, and Tenth Circuits. *Kochert*,

463 F.3d at 714-19; *Midwest Commc'ns, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, 449-50 (8th Cir. 1985); *Tal v. Hogan*, 453 F.3d 1244, 1253 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 1334 (2007).[5] These Courts, recognizing that Clayton Act § 4 is rooted in tort law as taught in *AGC*, 459 U.S. at 530-35, have required a more demanding analysis of the directness of connection between the alleged violation and the claimed injury. In fact, the Seventh Circuit's *Kochert* decision affirmed summary judgment dismissal on proximate cause grounds notwithstanding that plaintiff could "construct a reasonable causality chain linking her injury to defendant's actions." 463 F.3d at 715, 719 (causal connection between claimed injury and alleged violation was "tenuous at best").

Kochert, *Midwest*, and *Tal* are consistent with this Court's decision in *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996). In *Exxon*, the Court expressly reaffirmed in the context of admiralty tort law both "the requirement of legal or 'proximate' causation, and the related 'superseding cause' doctrine." *Id.* at 832. The lower courts in that case had found that, although Sofec's actions or omissions were deemed to be "causes in fact" of the stranding of the *Exxon Houston* tanker, Exxon's own subsequent actions were "the

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5. *See AGC*, 459 U.S. at 535 n.31 ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."). The Eleventh Circuit's decision below applying a minimal "injury in fact" analysis also conflicts with prior decisions of that same circuit. *E.g.*, *Florida Seed Co. v. Masonite Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997) ("A private plaintiff seeking damages under the antitrust laws must establish standing to sue. Antitrust standing requires more than the 'injury in fact' and the 'case or controversy' required by Article III of the Constitution.").

superseding and sole proximate cause" of the claimed damage; thus, the "chain of proximate causation required to impose liability on the original actor" was broken. *Id.* at 835-36. After confirming the continued viability of the proximate causation requirement and the superseding cause doctrine, this Court affirmed, noting that "[t]he issues of proximate causation and superseding cause involve application of law to fact, which is left to the fact finder, subject to limited review." *Id.* at 840-41.

By disregarding the "proximate cause" standard, and ignoring the district court's careful analysis of superseding cause, the Eleventh Circuit avoided coming to grips with the undisputed fact that Petitioners' bidding did nothing more than put Respondent to the test of increasing its own bid. Respondent had the resources and opportunity to outbid Petitioners. It chose instead to make its final bid, against legal advice, in a manner that plainly violated the rules of the bankruptcy auction. Not surprisingly, the district court found that Respondent's alleged injury was "self inflicted" and "occurred as a result of its own failed bidding strategy." App. 38a-40a; 42a (finding that "the only 'cause' of [Respondent's] alleged 'harm'" was its failure "to make a higher conforming bid"). Thus, while Petitioners' bidding may have been a "but for" cause of Respondent's failure to acquire the defunct assets at a bargain price, Respondent had every opportunity to avoid its alleged injury. Respondent's independent failure to make a conforming bid and secure the assets is the superseding and sole "proximate" cause of any alleged injury to Respondent and forecloses relief under Clayton Act § 4.[6]

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6. *See, e.g., Caraballo v. United States*, 830 F.2d 19, 23 (2d Cir. 1987) (in Federal Tort Claims Act case, plaintiff's conduct was (Cont'd)

Justice Scalia explained the importance of the *AGC* "proximate-cause" standard in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring):

> [I]t has always been the practice of common-law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct. Life is too short to pursue every human act to its most remote consequences; "for want of a nail, a kingdom was lost" is a commentary on fate, not the statement of a major cause of action against a blacksmith.

In sum, by failing to apply the proximate-cause element of standing under *AGC*, the Eleventh Circuit adopted an erroneous causation standard to reach an erroneous "by reason of" conclusion. If not corrected, this loose Article III "causal connection" standard will cause confusion in the lower courts and invite an unwholesome upsurge in antitrust claims from those remotely connected to alleged antitrust violations.

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the superseding cause and sole proximate cause of his injuries); *Faulkner v. Ensz*, 109 F.3d 474, 476-77 (8th Cir. 1997) ("An intervening cause is a new and independent force which interrupts the chain of events initiated by defendant's negligence in such a significant manner as to become the direct and proximate cause of the plaintiff's damages.") (citation omitted).

B. The Eleventh Circuit Misapplied The "Antitrust Injury" Requirement of Clayton Act § 4.

Since this Court's seminal decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), the "by reason of" standard of Clayton Act § 4 has been interpreted to require a showing of "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489. The Eleventh Circuit recited this "antitrust injury" requirement, but then proceeded to eviscerate it by failing to consider whether Respondent's inability to acquire the long-defunct physical assets was an "injury of the type the antitrust laws were intended to prevent," or instead was an expected consequence of the competitive process generated by a bankruptcy auction.[7]

The Eleventh Circuit focused its analysis on Respondent's alleged, but unproven, "exclusion from the relevant market" as a consequence of its failed bidding strategy. App. 10a.[8] It held that the admittedly lawful

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7. Based on the undisputed factual record, the district court found that: "[Respondent's] alleged 'injury' stems not from an reduction or elimination of competition; rather it derives solely from a claim that there was 'too much' competition at the auction and, because of that competition, it could not use taxpayer's money to appropriate the Steel Mill assets for a below-market price." App. 48a.

8. Despite the opportunity for full discovery and presentation of affidavits, Respondent made no showing that it could enter the alleged "relevant market" only if it acquired Gulf States Steel assets. Rather, as summarized by the Court below, Respondent merely contended that it could have entered if it had acquired those assets. App. 9a. Respondent's injury was thus the lost opportunity to acquire

(Cont'd)

competition in the market for dormant assets was irrelevant because Petitioners' "conduct did not *increase* competition in the relevant [downstream] market." App. 12a (emphasis added). On that basis it distinguished *Brunswick* where plaintiffs' claims for lost profits was connected to increased, albeit unlawful, competition in the downstream market for bowling services. App. 11a-12a.

(Cont'd)

the allegedly enabling assets at a bargain price, without any showing that other comparable assets were unavailable. Indeed, one of Respondent's principals testified during the bankruptcy proceedings that there was an "oversupply" of such assets. App. 28a. *See Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 97 (2d Cir. 1998) (defendant's purchase of particular site had no adverse effect on competition; "[w]hile [plaintiff] may not have readily acquired the location it preferred, [defendant's] one-time purchase of the site did not foreclose other prospective supermarket competitors from entering the market in desirable locations."). Moreover, the district court further found, based on the undisputed record:

> There is no evidence that [Petitioners] interfered with [Respondent's] ability to: (1) bid at the original May 2001 auction; (2) obtain financing, to understand the auction bidding procedures, to understand the Bankruptcy Code or to follow its bankruptcy attorney's advice that 'credit bidding won't work' at the September 2002 auction; or (3) make additional bids at the latter auction. As for [Respondent's] nonconforming bids, it was its non-compliance with the Bidding Procedures Order, negotiated with the input of [Respondent] and approved by the bankruptcy court, that prevented [Respondent] from obtaining the Steel Mill Assets, not the [Petitioners].

App. 39a-40a.

Closer analysis clearly demonstrates the error in this reasoning and its potentially pernicious consequences for future antitrust administration. Respondent, unlike the *Brunswick* plaintiffs, had not suffered lost profits or any other downstream loss because it had never participated in the alleged downstream market for hot rolled coil steel. Rather, Respondent's claims of loss were twofold: (1) Petitioners' bidding on the defunct assets, without regard to outcome, raised the price of the assets to a fair market value above the bargain "stalking horse" price Respondent had agreed to with the trustee; and (2) Petitioners' successful bidding prevented Respondent from acquiring the assets at the higher prices Respondent later bid, under competitive stimulus, at the auction. Both these claims relate to conduct in the market for used steel mill assets and neither can be "injury of the type the antitrust laws were intended to prevent."

First, recognizing a claim of antitrust injury from the loss of a "stalking horse" bargain would permit the so-called "preferred purchaser" doctrine invoked by the Eleventh Circuit, App. 8a, to turn the antitrust laws on their head. The "preferred purchaser" doctrine simply prevents what might otherwise be an unlawful acquisition of an *operating* business from being justified because the acquired entity is likely to fail. Even then, evidence that an allegedly "preferred" purchaser is willing to pay only an "unreasonably low" price for the ongoing business forecloses application of the doctrine. For good reasons, the "preferred purchaser" doctrine does not confer any right to complete an acquisition at a price of the purchaser's choosing. Recognition of such a right would permit, for example, a successful acquirer in any type of competitive auction process to claim "antitrust injury" against an unsuccessful, allegedly dominant, rival bidder on the theory that the rival caused "antitrust injury" by increasing

the "preferred purchaser's" acquisition price when its dominant position obligated it not to bid at all. App. 8a-9a.

Permitting "antitrust injury" to be premised on the loss of a below market purchasing opportunity also would defeat the charter of economic freedom embodied in the antitrust laws. It is essential in the free economy the antitrust laws seek to preserve that assets be permitted to move to their highest and best use. The same policy is embedded in the liquidation procedures pursued under Chapter 7 of the Bankruptcy Code. Non-predatory bidding advances these fundamental interests and could come from any number of sources.[9] Non-predatory competitive bids are to be expected in a free economy and there can be no valid claim that the consequences of making such bids could be an "injury of the type the antitrust laws were intended to prevent." *Brunswick*, 459 U.S. at 489. Thus, just as this Court has held that the competitors in *Brooke Group* and *Weyerhaeuser* have no shield from the adverse consequences of non-predatory pricing by rivals with market power, it should not afford Respondent "antitrust injury" protection from non-predatory bidding on non-producing assets.

Second, premising "antitrust injury" on Respondent's inability to acquire the assets at fair market value is equally pernicious. When the steel mill assets were put up for public auction, Respondent was at risk of competition for their purchase and had no legally protected interest in being the successful bidder. Respondent did have a legitimate interest in being free of predatory bidding justified by monopoly power in the downstream market, but it is undisputed that

9. In this case, the Italian Steel Company Palini é Bertoli was a potential alternative bidder, but "did not bid after it and [Respondent] discussed their bidding strategy with one another." App. 47a. n.18.

this case does not involve predatory bidding. App. 51a n.23 ("There is no allegation here that Park's bid was predatory;" and undisputed facts show that winning bid "cannot be deemed predatory"). Absent a predatory bid, there is no nexus between Petitioners' alleged downstream market power and the prices Park bid. Any competing buyer who recognized the arbitrage possibility presented in international markets by the auction process would have made the same bid. Respondent had no right to be protected from such bids and Petitioners' conduct clearly flowed from their appreciation of market opportunities rather than the alleged market power which Respondent claimed made their acts unlawful.[10] Thus, the Eleventh Circuit's injury theory cannot survive the essential *Brunswick* "antitrust injury" element and its reversal is necessary to preserve the economic efficiency that the antitrust laws properly seek to promote.

In sum, *certiorari* is necessary to clarify both the proper interpretation of "proximate cause" and "antitrust injury" and the essential role that each of these factors should play in the determination of antitrust standing under *AGC*.

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10. The district court found that "the Casey-Nucor deal was . . . an entirely sensible, good faith business arrangement between two companies (which operate in completely separate markets) to pursue jointly a business opportunity to buy and resell certain used assets at a substantial profit." App. 52a. It based this finding on the undisputed facts, including Casey's and Nucor's long past relationship in buying and selling used steel-related equipment, their recognition of the very low "stalking horse price," significantly higher salvage/scoop value, and huge potential upside profit from resale in the Asian market, the fixed $8 million cap on their bidding arrangement, and Respondent's admission that "it could have bid $8.1 million to win the auction, but made a 'business decision' not to do so." App. 50a-51a.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April 17, 2007

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 5, 2006

No. 05-15976

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GULF STATES REORGANIZATION GROUP, INC.,

Plaintiff-Appellant,

versus

NUCOR CORPORATION,
CASEY EQUIPMENT CORPORATION,
GADSDEN INDUSTRIAL PARK, LLC,

Defendants-Appellees.

(October 5, 2006)

Before ANDERSON, BARKETT and CUDAHY,* Circuit Judges.

ANDERSON, Circuit Judge:

I. BACKGROUND

This case concerns the Southeastern retail market for hot rolled coil, a type of thin steel used for items such as

* The Honorable Richard Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

highway railings and gas canisters. Appellant Gulf States Reorganization Group ("the Group") challenges Appellees' acquisition of steel mill assets in a bankruptcy auction as a violation of the antitrust laws. Appellee Nucor is the dominant producer of hot rolled coil for the relevant geographic market, the Southeast United States.

In 1999, Gulf States Steel, Inc. of Alabama ("Gulf States"), a competitor of Appellee, Nucor Corporation, filed for bankruptcy under Chapter 11, which was later converted to a Chapter 7 bankruptcy. It owned and operated a steel plant in Gadsden, Alabama. After Gulf States ceased operations, the Group was formed to purchase certain of its assets in the Gadsden mill that could be used to produce hot rolled coil ("the Assets"). In 1999, an independent assessor had put the total market value of the Assets at approximately $19.8 million. In May 2001, a bankruptcy auction was held and the Assets were unsold because neither the Group nor other potential bidders would meet the reserve price of $7.1 million.

During 2001 and 2002, the Group entered into private negotiations with the Bankruptcy Trustee for the purchase of the Assets. In 2002, in preparation for these negotiations, the Group determined that the Assets had a value of at least $13.3 million. In June 2002, the Group offered the Trustee $5 million for the Assets. The bankruptcy court then issued an order saying that the Assets would be sold to the Group unless another party made a higher bid, in which case a second bankruptcy auction would be held.

Appendix A

This order came to the attention of Appellee Casey Equipment Corporation and Appellee Nucor Corporation. The two companies have a long relationship of buying and selling used steel equipment. They agreed to form a third entity, Appellee Gadsden Industrial Park LLC ("Park") to bid for the Assets and to resell them. Nucor would fund the bid and Casey would manage the sale. Nucor would have an unilateral right to reject any sale of the Assets to domestic purchasers, but a more limited right with respect to foreign ones. They agreed that the highest bid they would make was $8 million.

On September 12, 2002, Park bid $5,250,000 for the Assets, triggering the auction. The Group contacted the Federal Trade Commission about Nucor's involvement but the Commission did not take any action. On September 16, 2002, the bankruptcy auction was held. Prior to the auction, the Group had received $5 million in additional support from the Gadsden Development Authority and $1.5 million from Jefferson Iron & Metal Brokerage, Inc., a scrap dealer. Park's final bid for the Assets was $6.3 million in cash. The Group submitted a part credit/part cash bid of $7 million, even though it had been advised that a credit bid would not be allowed.

The trustee rejected the Group's bid but gave it extra time to make a conforming bid. Although the Group could have made a cash bid of $8.1 million, it did not do so. Thus, Park's bid of $6.3 million was accepted by the bankruptcy trustee. After prevailing, Appellees resold most of the Assets in the Asian market for nearly three times the amount of their successful bid.

Appendix A

On October 23, 2002, the Group sued Appellees in the federal district court for the Northern District of Alabama, alleging violations of Sections 1 and 2 of the Sherman Act. On September 30, 2005, the district court granted Appellees summary judgment on all counts, dismissing the case with prejudice. The Group timely filed an appeal and this case is properly before us.

II. DISCUSSION

We review a district court's grant of summary judgment *de novo. Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir.2004).

Before the district court, the Group alleged that the Appellees violated Section 1 of the Sherman Act, prohibiting agreements to restrain trade, and that Nucor violated Section 2 of the Sherman Act, prohibiting monopolization. The district court granted the Appellees summary judgment for three reasons: (1) The Group lacked Article III standing because it did not show that the defendants had caused its injury; (2) the Group lacked "antitrust standing" because it failed to demonstrate "antitrust injury," that is to say injury of the sort that the antitrust laws are meant to redress; and (3) the defendants' actions could not constitute a violation of the antitrust laws because they increased competition in the bankruptcy auction. We conclude that to the contrary, the Group properly demonstrated both causation and antitrust injury and we remand this case to the district court to determine whether the challenged transaction violated the antitrust laws.

Appendix A

A. *The Group Adduced Sufficient Evidence of Causation.*

Because the Constitution limits the subject matter jurisdiction of federal courts to cases and controversies, a plaintiff must demonstrate "a causal connection between the injury and the conduct complained of" to have standing in a federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). In the instant case, the Group maintains that the injury it suffered was exclusion from the relevant market on account of its failure to purchase the Assets. The conduct complained of is Appellees' arrangement to have Nucor fund Park's bid. The Group alleges that Nucor enjoys a monopoly in the relevant market and therefore it could not have participated in the auction without violating the antitrust laws.

These assertions state a clear causal connection between the plaintiff's injury and the defendants' conduct. The bankruptcy court had previously told the Group that it could purchase the Assets unless a rival bidder offered a higher cash bid at the bankruptcy auction. At auction, the Appellees offered a higher cash bid. As there were only two bidders in the auction, it is clear that the Group would have purchased the Assets but for the Appellees' participation in the auction.

The district court held otherwise, concluding that the cause was the Group's decision to submit, not a higher cash bid, but instead a non-conforming part credit/part cash bid. However, the mere fact that the Group's own decisions played a role in its failure to win at auction does not obviate the causal connection between the defendants' conduct and the plaintiff's injury. Antitrust law does not require that the

defendant be the exclusive cause of the plaintiff's injury but only a "material" one. *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1561-62 (11th Cir.1987) ("To recover under the antitrust laws, a plaintiff must prove that a defendant's illegal conduct materially contributed to his injury.") It is true that the Group could have prevailed had it submitted a higher cash bid. But the Group's need to make a higher bid was occasioned only by the participation of Nucor. If Nucor's participation were a violation of the antitrust laws—an issue that we do not decide today—then it would be improper to regard the Group's injury as entirely self-caused.

Thus, we conclude that the Group has satisfied the causation-in-fact requirement for standing in federal courts.

B. *The Group Has Properly Alleged Antitrust Injury.*

In addition to the general standing requirements that apply to all plaintiffs in federal court, plaintiffs challenging violations of the antitrust laws must also show that they have suffered "antitrust injury," or "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). That is to say, even assuming that the Appellees did violate the antitrust laws, the Group must still show that its injury due to those violations was the sort that the antitrust laws were intended to prevent. We conclude that the Group has properly alleged antitrust injury.

Appendix A

We begin our antitrust injury inquiry by characterizing the precise violation asserted by the Group. We note that while the actual claims in the Complaint are violations of Sections 1 and 2 of the Sherman Act, the allegedly anticompetitive conduct on which the Group bases its claims is an asset acquisition, thus implicating Section 7 of the Clayton Act.[1] Section 7 of the Clayton Act prohibits corporations from asset acquisitions that will lessen competition or tend to create a monopoly. 15 U.S.C. § 18.[2]

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1. The substance of the issue was litigated below and on appeal and thus is fairly before us. In any event, even though mergers and asset acquisitions are normally challenged under Section 7 of the Clayton Act, courts have permitted them also to be challenged under Sherman § 2 if they will create or maintain a monopoly. *See, e.g., Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 61 (1st Cir.2002) (stating that a "merger to monopoly" can be challenged under Sherman § 2); *see also, Golden Grain Macaroni Co. v. F.T.C.*, 472 F.2d 882, 886-87 (9th Cir.1972).

2. The statute reads in relevant part:

> no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18. The statute defines "person" to include "corporation." 15 U.S.C. § 7. *See also, U.S. v. Von's Grocery Co.*, 384 U.S. 270, 275, 86 S.Ct. 1478, 1481, 16 L.Ed.2d 555 (1966) (noting that the Clayton Act was amended to cover asset acquisitions because "corporations [would] merge simply by purchasing their rivals'

(Cont'd)

Appendix A

If an acquisition of assets of a competitor in the relevant market by a monopolist or dominant firm might otherwise substantially lessen competition, that acquisition may nonetheless be tolerated under the "failing company defense," which allows a dominant firm to purchase assets from a competitor that is about to leave the relevant market, as long as there exist no competitively preferable purchasers of those assets. *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969); *see also*, 4 Phillip E. Areeda et al., *Antitrust Law* ¶ 954 (hereinafter, "Areeda"). If such a purchaser exists, the dominant firm should defer to the preferred purchaser, at least unless the preferred purchaser's bid is "unreasonably low." 4 Areeda ¶ 954(e).

The Group asserts the following: (1) Nucor is by far the dominant producer in the relevant market, enjoying a market share of 85%; (2) the Group wanted to and had the ability both to purchase the Assets and to compete with Nucor in the relevant market; (3) the Assets would constitute substantially all of the assets necessary for a potential entrant into the market to begin operations and compete;[3] (4) Nucor

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assets" in order to escape Section 7 of the Clayton Act); *Dr. Pepper/Seven-Up Companies, Inc. v. F.T.C.*, 991 F.2d 859, 864-66 (D.C.Cir.1993) (discussing the failing company defense in the context of a soda company's purchase of a bottler's assets in a bankruptcy auction).

3. Thus, a holding for the Group in this case would not involve a rule of law that a potential antitrust violation exists whenever a dominant firm purchases an isolated piece of commonly available equipment

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was thus obliged not to bid against the Group, the preferred purchaser for the Assets; (5) Appellees violated the merger laws by having Nucor participate in the bidding by funding Park's bid; and (6) Appellees' conduct was a proximate cause of the Group's failure to purchase the assets and its exclusion from the relevant market.

(Cont'd)

necessary for its ongoing operations that a non-dominant competitor or new entrant had also wanted. *See* 4 Areeda ¶ 356 (stating that a non-dominant competitor usually cannot challenge a dominant rival's asset acquisition (even if illegal) on the grounds that it would have acquired the asset but for the dominant rival's purchase because ". . . the plaintiff's loss of an opportunity to acquire an asset is not a reason for finding [that acquisition] unlawful.") Such a rule might have anti-competitive effects in the relevant market by inhibiting a dominant firm's access to the inputs markets for equipment necessary to maintain its productive capacity. The antitrust laws allow legal monopolies to compete vigorously on the merits in the relevant market, even if such competition drives out competitors. *See United States v. Grinnell*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966) (stating that Sherman Act liability does not extend to firms that become monopolies by virtue of "superior product, business acumen, or historic accident."); *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir.1986) (stating that courts recognize that "the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors."); *see also, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP.*, 540 U.S. 398, 415-16, 124 S.Ct. 872, 883, 157 L.Ed.2d 823 (2004) ("The Sherman Act . . . does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.") Because a firm's access to inputs is essential to its ability to compete in the relevant market, this means that they must be allowed to compete in the inputs markets associated with the relevant market.

The Group contends that, if it can prove these assertions, this would mean that Nucor maintained its purported near-monopoly and denied consumers in the relevant market the benefit of the pressure to lower prices that would likely come about if the Group became a viable competitor, thus substantially lessening competition and violating the antitrust laws.

We decline to address the merits; that is, we decline to address whether the foregoing contentions of the Group would in fact substantially lessen competition in the relevant market and violate the antitrust laws.[4] However, we conclude that the district court erred in concluding that the Group had failed to show antitrust standing. We conclude that the injury to the Group—its exclusion from the relevant market—is inseparable from the alleged harm to competition. It is this same exclusion from the market that denies consumers the benefit of the pressure to lower prices that would likely accompany the Group's becoming a viable competitor.[5] Thus

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4. We decline to address the merits because the district court has not addressed this issue as it is properly framed, and because resolution of the issue will require further development of the record and further fact-finding with respect to whether the challenged acquisition had the effect of substantially lessening competition in the relevant market. Thus, we vacate the district court's holding on the merits.

5. Unlike the non-dominant competitor who lost the opportunity to purchase an isolated asset and whose injury-in-fact is not an antitrust injury because that injury-in-fact is not the reason for finding the dominant firm's acquisition illegal—as discussed in note 3 *supra* and in 4 Areeda ¶ 356—the exclusion of the Group from the market *is* the reason that Appellees' acquisition may be found to be illegal.

we conclude that the Group has satisfied the requirement of demonstrating antitrust injury, i.e. injury of the type against which the antitrust laws are designed to protect. *See, e.g., Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90 (2d Cir.1998) (implicitly recognizing antitrust standing of excluded potential competitor); 2 Areeda ¶ 356(a) (stating that while rivals rarely have standing to challenge mergers, potential competitors can do so when the merger will exclude them from the relevant market and citing *Bon-Ton Stores v. May Department Stores Co.*, 881 F.Supp. 860 (W.D.N.Y. 1994)).

In holding otherwise, the district court emphasized the fact that the bankruptcy auction was governed by full and fair competition. However, under the merger laws, the propriety of mergers and asset acquisitions is measured by the competitive effects such acquisitions would have in the relevant market, not by the level of competition in the market for the target company or acquisition. For example, a monopolist who purchases a majority share of the stock of one of its competitors cannot defend its merger on the grounds that the shares were publicly traded and open to all.

Because the district court did not properly consider the harm to competition in the relevant market, its reliance on *Brunswick* is misplaced. In that case, one of the two largest manufacturers of bowling equipment in the United States experienced difficulty (during an economic decline in the industry) in collecting from the many bowling centers still owing Brunswick for bowling equipment supplied. To meet this difficulty, it began acquiring and operating defaulting bowling centers, making it by far the largest operator of

bowling centers. Several competing bowling centers filed suit alleging a violation of the antitrust laws because the acquisitions might substantially lessen competition or tend to create a monopoly. However, the injury they suffered, lost profits, was connected to conduct that actually increased competition in the relevant market and thus could not be considered antitrust injury. In contrast, here the Appellees' conduct did not increase competition in the relevant market.

Thus, we conclude that the Group has shown antitrust injury.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's holding with respect to proximate cause and antitrust injury;[6]

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6. We believe that *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444 (8th Cir.1985), is distinguishable. That case is similar to the instant case in that both involve antitrust suits by a plaintiff whose bid to purchase assets (TV rights in that case) lost out. The Eighth Circuit indicated that the plaintiff there failed to show either proximate cause or antitrust injury. With respect to proximate cause, the Eighth Circuit held that the causal connection between the alleged illegal tying arrangement and plaintiff's injury was tenuous at best. *Id.* at 451. Apparently, that was because the winning bid was more advantageous to the defendant seller than the losing bid. *See id.* at 448-49. In any event, the jury had made a specific finding that the plaintiff had not suffered any injury. *Id.* at 449. By contrast, in this case, we have held that the Group has shown proximate cause. With respect to antitrust injury, the Eighth Circuit held that the plaintiff was neither an actual or potential competitor who was foreclosed from the market, nor a consumer of the TV

(Cont'd)

we vacate the district court's holding with respect to the merits;[7] and we remand for further proceedings not inconsistent with this opinion.

REVERSED IN PART, VACATED IN PART, and REMANDED.

(Cont'd)

service who was hurt by the tying arrangement. *See id.* at 451. Unlike *Midwest*, we have held that the Group has shown that Nucor's participation in the auction was causally related to its exclusion from the market, and that this exclusion of a potential competitor from the market was the type of injury which the antitrust laws were intended to prevent.

7. Our intention is to express no opinion at all with respect to the merits—i.e., whether the actions of appellees substantially lessened competition in the relevant market and violated the antitrust laws. See note 4, *supra*. Thus, we express no opinion with respect to the remarks in Judge Cudahy's separate opinion, except to say that we agree with Judge Cudahy that *if* the Group proves on remand that "Nucor substantially lessened competition in the relevant market" for hot rolled coil, the Group will have proved a violation of the antitrust laws. However, we express no opinion on that issue; we prefer for the district court to conduct the appropriate analysis in the first instance and on a more fully developed record. Nor do we intend to express an opinion on or preempt the district court's discretion with respect to the nature of the appropriate course of action on remand, e.g., immediate trial or further summary judgment proceedings. See Fed.R.Civ.P. 56(d).

Appendix A

CUDAHY, Circuit Judge, concurring in part and, perhaps, dissenting in part:

This case is about suppression of potential competition by a monopolist—the very essence of anti-competitive conduct. *See United States v. El Paso Natural Gas*, 376 U.S. 651, 660-62, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964). I agree with the conclusion of the majority that the allegations here pass both applicable tests of standing. It is not clear to me, however, for what purpose—beyond trial—the matter must be remanded to the district court. In the words of the majority, remand is being ordered to determine "whether the challenged acquisition had the effect of substantially lessening competition in the relevant market" (Majority Op. at 967 n.4), and to determine "whether the challenged transaction violated the antitrust laws" (id. at 965). If this is a remand merely to determine whether the facts conform to the allegations, I have no quarrel with it. However, if there is a suggestion that the allegations might be defective or incomplete, I respectfully disagree.

It has been alleged that by moving to protect its 85 percent market share and hence its effective monopoly, Nucor substantially lessened competition in the relevant market (purportedly the market for hot-rolled coil in the Southeast) and has preserved its power to set prices and control output in that commodity. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). It is evident on appeal that these allegations, if proven, will show a violation of the antitrust laws. Whatever may have happened in the auction market for steel-making assets is irrelevant (as the majority seems to agree) and cannot alter the nature

of the alleged antitrust violation. I would emphasize that efforts to retain a monopoly by definition harm competition and there is no further need in those circumstances to explore the state of competition. *See id.* at 576, 86 S.Ct. 1698 (recognizing that a firm with monopoly power that acquired potential competitors "perfected the monopoly power to exclude competitors and fix prices"). Consequently, the matter may now proceed to trial.

Although the argument is not relied on by the majority opinion, a major element of Nucor's litigation strategy was the contention that its conduct was excused by its "legitimate business purpose" to make money by trading in steel-making assets. But the concept of a legitimate business purpose as a defense to an allegation of anti-competitive conduct is simply an application of the principle of the rule of reason, which holds that the alleged anti-competitive consequences of a challenged practice may be weighed against its ostensible benefits to competition and to consumers in the larger scheme of things. 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1500 (2d ed. 2003 & Supp.2006). The purpose of this principle is to facilitate and broaden analysis of the impact certain restraints may have on competition in the relevant market and on consumers, not on the monopolist. Id. ¶ 1504 ("[T]he rule of reason is not hospitable to every claim within the realm of reason, but only to matters bearing at the competitive significance of a restraint."). Invoking it here is of no help to Nucor, since the claimed benefits (making money) accrue only to the monopolist, not to consumers. Nucor's purportedly legitimate business reason for entering the auction concerns a separate and unrelated deal in assets, which is of no significance in evaluating the

character of its conduct in blocking competition. Thus, Nucor has acted to prevent a potential competitor from entering the market in which it enjoys a monopoly, ostensibly to make money in a wholly different market. There is no claim that this alternative activity alters the effect that the primary exercise of monopoly power has on competition or consumers. There is nothing analogous here to the rule of reason, and the purported business purpose is not encompassed by that principle.

The monopolist here has succeeded in converting this rather elementary antitrust case into an argument about the propriety of a bankruptcy auction. But it matters not at all whether the Group bid at all or how much it bid at the auction. By entering the auction and seeking to buy the assets, Nucor and its co-conspirators allegedly took an action having the effect of excluding the Group from the market and maintaining Nucor's monopoly, which injured the Group and is the source of its damages. *See, e.g., Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir.1984) ("Exclusion from a market is a conventional form of antitrust injury that gives rise to a claim for damages as soon as the exclusion occurs. . . .").

I concur in the determination that the Group has standing but respectfully dissent from any suggestion that the district court do more than put the allegations to the proof.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, EASTERN DIVISION DATED AND FILED SEPTEMBER 30, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

Case No.: 1:02-cv-2600-RDP

GULF STATES REORGANIZATION GROUP, INC.,

Plaintiff,

v.

NUCOR CORPORATION, et al.,

Defendants.

MEMORANDUM OPINION

This case is before the court on Defendants' Motion for Summary Judgment. (Doc. # 82). Plaintiff filed its opposition to summary judgment on January 24, 2005. (Docs.# 88, # 92). Defendants filed their reply on March 7, 2005. (Docs. # 94, # 95). Defendants' motion is now under submission and ripe for ruling by this court.

I. INTRODUCTION

Plaintiff Gulf States Reorganization Group ("GSRG") filed this antitrust litigation on October 23, 2002 against Defendants Nucor Corporation ("Nucor"), Casey Equipment

Corporation ("Casey"), and Gadsden Industrial Park, LLC ("Park"). (Doc. # 1). The undersigned was reassigned this case on October 1, 2003. (Doc. # 47).

On October 31, 2003, Defendants filed their first Motion for Summary Judgment. (Doc. # 50). After reviewing the parties' briefing and conducting a hearing with oral argument, the court entered an order denying Defendants' motion without prejudice, allowing for the parties to conduct additional discovery, and establishing a new summary judgment deadline of December 15, 2004. (Docs.# 67, # 68).

On December 15, 2004, Defendants filed their second Motion for Summary Judgment and supporting materials. (Docs. # 82, # 86). Defendants base their second summary judgment motion on three independent grounds: (1) lack of causation; (2) lack of antitrust standing because of an absence of any "antitrust injury;" and (3) an absence of any anti-competitive activity by Defendants. (Doc. # 83 at pp. 12, 13-25). The court has carefully reviewed the summary judgment record and for the reasons stated in more detail below, agrees with Defendants that there are no material factual disputes and that Defendants are entitled to judgment as a matter of law. Accordingly, consistent with this memorandum opinion, the court will enter an order granting Defendants' Motion for Summary Judgment and dismissing Plaintiff's Complaint with prejudice.

Appendix B

II. STATEMENT OF FACTS

A. General Background

Prior to August 2000, Gulf States Steel, Inc. of Alabama ("Gulf States Steel") owned and operated a steel plant in Gadsden, Alabama. (AF No. 1;[1] *see also In re Gulf States Steel, Inc. of Ala.*, 285 B.R. 497, 499 (Bankr.N.D.Ala.2002) (Findings of Fact and Conclusions of Law and Order Granting Trustee's Motion for an Order Authorizing Sale of Property of the Estate Free and Clear of Liens and Other Interest) ("Bankruptcy Order")).[2] On July 1, 1999, Gulf States Steel filed for reorganization protection under Chapter 11 of the United States Bankruptcy Code (AF No. 2), but failed to reorganize under Chapter 11 of the Bankruptcy Code (AF No. 3). In August 2000, Gulf States Steel closed its Gadsden operations, including the steel-related assets which are the subject of this litigation ("Steel Mill Assets"). (AF No. 4).

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1. The designation "AF" stands for admitted fact and indicates a fact offered by Defendants that Plaintiff has admitted in its Responses and Counterstatement of Material Facts Submitted in Response to Exhibit A of the Court's Order Governing Proceedings (Doc. # 88), in its representative deposition testimony, or which is undisputed based upon other evidence in the Rule 56 file. Whenever Plaintiff has adequately disputed a fact offered by Defendants, the court has accepted Plaintiff's version. The court's numbering of admitted facts (*e.g.*, AF No. 1) corresponds to the numbering of Defendants' Statement of Facts. (Doc. # 84).

2. The court notes that several of the following admitted facts are derived from the findings contained in the Bankruptcy Order.

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In November 2000, the Gulf States Steel bankruptcy was converted to a Chapter 7 liquidation. (AF No. 5). On January 26, 2001, GSRG was formed to purchase the Steel Mill Assets of the former Gulf States Steel Plant in Gadsden, Alabama and to reopen the plant. (AF No. 6).

As part of the preparation for the Chapter 11 reorganization filing by Gulf States Steel, MB Valuation Services, Inc. performed an appraisal of the assets held by Gulf States Steel in March 1999. (AF No. 9; *see generally* MB Valuation Services, Inc., Gulf States Steel, dated March 22, 1999 ("MB Valuation Report"), attached as Exhibit 1 to the Casey Affidavit) The appraisal was performed on an "Orderly Liquidation Value" basis, which means "[t]he estimated gross amount expressed in terms of money which could be typically realized from a sale, given a reasonable period of time to find a purchaser(s), the seller being compelled to sell on an as is-where is basis." (AF No. 10; MB Valuation Report at 7).

The MB Valuation Report stated that the "Orderly Liquidation Value" of the hot strip mill at the Gulf States Steel Mill was $6,241,965. (AF No. 11; MB Valuation Report at 156). The MB Valuation Report stated that the "Orderly Liquidation Value" of the plate mill at the Gulf States Steel Mill was $9,618,305. (AF No. 12; MB Valuation Report at 244). The MB Valuation Report stated that the "Orderly Liquidation Value" of the Demag Slab Caster at the Gulf States Steel Mill was $4,010,000. (AF No. 13; MB Valuation Report at 117).

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John Duncan ("Duncan") was one of GSRG's principals. (AF No. 14). Duncan was also President of Gulf States Steel and was retained by the senior secured lender, Ableco Finance LLC ("Ableco"), located in New York, to sell the Steel Mill Assets. (AF No. 15). In May 2001, the Steel Mill Assets which are at issue in this litigation (including the plate mill, hot strip mill, and Demag Slab Caster) were offered for sale at a bankruptcy auction conducted by DoveBid. (AF No. 7). GSRG was aware that minimum bids were set up on various pieces of equipment, including the key Steel Mill Assets, at the May 2001 auction. (AF No. 16).

At the May 2001 auction, GSRG was present, and GSRG or persons associated with it purchased several assets other than the Steel Mill Assets at this auction. (AF No. 17). The Steel Mill Assets did not attract a bid or bids sufficient to meet the seller's reserve price of $7.1 million for the plate mill, the hot strip mill, and the caster, which were the key Steel Mill Assets. (AF No. 8). GSRG did not make a $7.1 million bid for the key Steel Mill Assets at the May 2001 auction. (AF No. 18). Had GSRG made a $7.1 million bid, it would have acquired the key Steel Mill Assets at the May 2001 auction. (AF No. 19).

Following the May 2001 auction, GSRG entered into negotiations with the Trustee and Ableco about a private purchase of the Steel Mill Assets. (AF No. 20). In early to mid 2001, GSRG entered into negotiations with the Gadsden-Etowah County Industrial Development Authority ("Development Authority") for a $5 million loan/lease to be used in the purchase of the Steel Mill Assets. (AF No. 21). In late 2001, the Italian steel firm of Palini é Bertoli expressed

interest in purchasing the Steel Mill Assets. (AF No. 22). On December 20, 2001, Mike McCain of the Development Authority sent Palini é Bertoli an e-mail, requesting that Palini é Bertoli develop a relationship with GSRG and its Chairman, Frank E. Williams, Jr. ("Williams"), and expressing the Development Authority's "legal, moral, and ethical obligation" to GSRG. (AF No. 23).

In March 2002, as part of its internal analysis in preparation for a purchase of the Steel Mill Assets, GSRG assigned the core Steel Mill Assets a book value of at least $13.3 million. (AF No. 24). In March 2002, GSRG's Management Presentation and Company Overview stated that the "Economic Acquisition of Core Assets" was one of its "Fundamentals for Success" and, in its Financial Overview, discussed "Donated Surplus Capital-$5M IDB Bond Issue." (AF No. 25). In June 2002, GSRG contracted with the Trustee to purchase the Steel Mill Assets for $5 million, an amount equal to the funds being loaned to GSRG by the Development Authority. (AF No. 26).

On July 3, 2002, the Trustee moved for An Order Establishing Bidding and Other Procedures In Connection With Sale of Property of the Estate Free and Clear of Liens and Other Interests and Motion For Authority For Such Sale ("Sale Motion") in order to sell the Steel Mill Assets. (AF No. 27). The proposed sale was to GSRG for the purchase price of $5 million pursuant to an Asset Purchase Agreement, or, alternatively, to the highest bidder pursuant to a bidding procedure to be prescribed by the bankruptcy court. (AF No. 28). The terms of the Asset Purchase Agreement and the specific bidding procedures were drafted by representatives of Ableco and GSRG. (AF No. 29).

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On July 10, 2002, representatives from Palini é Bertoli toured the Gadsden steel plant. (AF No. 30). During this visit, representatives of the Development Authority met with representatives from Palini é Bertoli.[3] (AF No. 31). At this time, the Development Authority continued to encourage Palini é Bertoli to partner with GSRG rather than bid independently. (AF No. 32).

On July 15, 2002, representatives from Palini é Bertoli met with officials of GSRG, including Williams. (AF No. 33). During this meeting, GSRG and Palini é Bertoli discussed the idea that competing bids in excess of $5 million would not be in either party's interest. (AF No. 34).

There are markets, both domestic and international, for the purchase and sale of used steel mill equipment. (AF No. 35). Defendant Casey is actively involved in buying and selling used steel-related equipment and has participated in this business for some forty years. (AF No. 36). Park is a limited liability company in which Donald A. Casey, Chairman of Casey, is a member. (AF No. 37). On August 19, 2002, Defendant Park, through an attorney, objected to the Sale Motion. (AF No. 38).

On August 21, 2002, the bankruptcy court held a hearing in regard to the Sale Motion and on August 26, 2002 ruled that bids identical to the GSRG offer were not required and that potential purchasers could bid for less than all of the property encompassing the Steel Mill Assets. (AF No. 39). Subsequently, the bankruptcy court entered an order

3. GSRG understood that Palini é Bertoli had an interest in using the plate mill which was in place in Gadsden. (AF No. 93).

("Bidding Procedures Order") granting the Trustee's Sale Motion with certain modifications, including one allowing potential bidders to bid on less than all of the property. (AF No. 40). GSRG did not appeal or otherwise challenge the Bidding Procedures Order. (AF No. 41). The Bidding Procedures Order stated that if someone other than GSRG made a "qualifying bid" higher than GSRG's proposed purchase price for the Steel Mill Assets, then an auction of those assets would be triggered. (AF No. 42).

Prior to the September 2002 public auction, GSRG contacted the Federal Trade Commission ("FTC") to raise possible antitrust concerns about Defendant Nucor's alleged involvement in Park's purchase of the Steel Mill Assets. (AF No. 43). There is no evidence that the FTC took any action in response to GSRG's complaint. (AF No. 44).

On September 12, 2002, Park timely submitted a bid of $5,250,000 in conformity with the Bidding Procedures Order. (AF No. 45). In the past, Nucor has purchased and/or sold used steel-related equipment in the used capital asset market. (AF No. 46). On September 12, 2002, Palini é Bertoli attended the hearing at which Park's $5,250,000 bid triggered the September 16, 2002 auction. (AF No. 47). Palini é Bertoli did not bid in the September 16, 2002 auction. (AF No. 48). At the time of Park's bid, the Steel Mill Assets had been shuttered for over two years. (AF No. 49). In those two years, the assets had been sitting idle, with little or no maintenance, and with exposure to the elements. (AF No. 50).

On September 16, 2002, the Trustee held a public auction for the Steel Mill Assets. (AF No. 51). Prior to the auction,

GSRG received financial support of $5 million from the Development Authority, which was to be repaid through future taxes. (AF No. 52). Also prior to the auction, GSRG received an additional $1.5 million in financial support or promises of financial support from Jefferson Iron & Metal Brokerage, Inc., a scrap dealer. (AF No. 53). At the September 16, 2002 auction, Park's final cash bid was for $6.3 million, which was higher than the conforming cash bids by GSRG, the only other bidder. (AF No. 54).

GSRG subsequently tendered a part credit/part cash bid at the auction that it valued at some $7 million. (AF No. 55). This subsequent bid did not conform to the auction procedures set out in the Bidding Procedures Order. (AF No. 56). The Trustee rejected GSRG's $7 million bid because it was not all cash and did not conform to the auction procedures. (AF No. 57). The Trustee then extended the time in which GSRG could submit an unqualified cash bid in excess of that of Park. (AF No. 58). GSRG refused to submit any further bid. (AF No. 59).

After the September 16, 2002 auction, the bankruptcy court held a hearing which all claims made by GSRG were considered. (AF No. 60). GSRG also filed (1) a Motion For Order Compelling Trustee to Accept Bid of Gulf States Reorganization Group, Inc. and (2) an Objection of Gulf States Reorganization Group, Inc. to Consideration of Bid by Gadsden Industrial Park, LLC and Motion to Disallow the Same. (AF No. 61). On September 27, 2002, the bankruptcy court issued a written order approving the sale of the Gadsden Steel Mill Assets to Park in its Bankruptcy Order. (AF No. 62). The bankruptcy court denied GSRG's

and others' motions to amend or alter the sale of the Steel Mill Assets to Park. (AF No. 63). The bankruptcy court approved the Trustee's rejection of GSRG's nonconforming $7 million bid. (AF No. 64).

In the Bankruptcy Order, the bankruptcy court expressly found that the Steel Mill Assets were "properly exposed to the marketplace thereby allowing maximization of interest in bidding on the assets." (AF No. 65). The bankruptcy court further found "that there was no collusion or bad faith motive on the part of the Trustee or any bidder in connection with the Sale Motion, and that all negotiations and bidding occurred at arms length." (AF No. 66). In addition, the bankruptcy court found that "the Trustee's decision to accept the higher and better bid of Park is consistent with sound business judgment, and is due to be approved." (AF No. 67).

GSRG initially appealed the orders of the bankruptcy court. (AF No. 68). Subsequently, GSRG dropped all appeals of the Bankruptcy Order, which awarded the Steel Mill Assets to Park for $6.3 million. (AF No. 69). The bankruptcy court's proceedings on this matter are complete, and the Bankruptcy Order is final and conclusive. (AF No. 70).

There is no evidence that Defendants Park, Casey or Nucor interfered with GSRG's: (1) financing of its bids for the Steel Mill Assets (AF No. 71); (2) ability to make bids at the May 2001 auction (AF No. 72); or (3) ability to make higher, conforming cash bids at the September 2002 auction (AF No. 73).

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After Park acquired the Steel Mill Assets at the September 2002 auction, Casey arranged for the sale of the majority of the Steel Mill Assets for an aggregate price of approximately three times the amount of the $6.3 million purchase price and approximately the MB Valuation Services appraisal value. (AF No. 76). In July 2003, a contract was entered into for the sale, on an "as is-where is" basis, of the plate mill, slab caster, BOF equipment, and ladle metallurgical furnace (along with certain ancillary items) for $11 million. (AF No. 77). In August 2003, a separate agreement was entered into with another customer on an "as is, where is" basis for the sale of the hot strip mill in exchange for $7 million (minus $235,000 for a motor that was not part of the Steel Mill Assets). (AF No. 78). Subsequent to the September 2002 auction, Park leased to several tenants facilities located in the industrial park situated on the real property acquired as part of the Steel Mill Assets in the September 2002 auction. (AF No. 79).

B. GSRG's Bidding Strategy at the Bankruptcy Auction

GSRG's sole shareholder is Frank E. Williams, Jr. (AF No. 80). As of mid-2002, Mr. Williams had a personal net worth of $28.5 million, including $16.8 million listed as "Marketable Securities," and was the sole beneficiary of an estate then in probate valued at an additional $6.2 million. (AF No. 81). GSRG was fully aware of the 1999 MB Valuation Report stating that the Steel Mill Assets at issue in this litigation had a combined "Orderly Liquidation Value" of not less than $19.8 million. (AF No. 82). GSRG repeatedly represented to potential investors that the value of the Steel Mill Assets was some $19-22 million. (AF No. 83).

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In addition to being an officer and principal of GSRG, Duncan was the last CEO of Gulf States Steel and had been retained as a consultant by the senior secured lender Ableco, which had a superpriority lien on all estate assets. (AF No. 84). To justify the low $5 million purchase price proposed by GSRG for the Steel Mill Assets, Duncan testified before the bankruptcy court on August 21, 2002 that "the value of this property is depressed by an oversupply of this property." (AF No. 85). At the time of the September 16, 2002 auction of the Steel Mill Assets, GSRG and Williams had earmarked for other uses: (a) $5 million in cash from the Development Authority; (b) $1.5 million in cash from Jefferson Iron & Metal Brokerage, Inc.; (c) $1 million in cash from GSRG's bid deposit; and (d) William's personal assets worth some $28-35 million, including more than $16 million listed as "Marketable Securities." (AF No. 86). As Plaintiff maintains, GSRG and Williams did not have sufficient liquidity to make a bid of more than $8 million in cash at the September 16, 2002 auction of the Steel Mill Assets. (AF No. 91).

Just before the start of the September 16, 2002 auction, Williams made a business decision that GSRG would not bid more than $6.3-6.4 million in cash, but instead would switch to a part credit/part cash bid if the bidding reached that level. (AF No. 94). According to GSRG corporate records, on or about September 11, 2002, Williams had reported to other GSRG officers that he had been advised by GSRG's bankruptcy counsel, Daniel M. Press, that "credit bidding won't work." (AF No. 95). GSRG had not reached any agreement or understanding with the Indenture Trustee, which was the only entity that had the legal authority to bind all the Gulf States Steel bondholders, that would permit

GSRG to submit a so-called "credit" bid. (AF No. 96). In submitting GSRG's part credit/part cash bid at the September 16, 2002 auction, Williams claims that he relied upon the advice of GSRG's General Counsel, Daniel K. Maller. (AF No. 97). Mr. Maller is not an expert in bankruptcy law. (AF No. 98).

C. Nucor-Casey Relationship

Nucor and Casey have been doing business together for many years, including activities associated with the buying and selling of used steel-related equipment. (AF No. 102). Nucor has a wholly-owned subsidiary, Stenroh, Inc. ("Stenroh"), which it regularly uses as an acquisition vehicle to acquire land, equipment and other assets. (AF No. 103). Nucor was not aware of, and did not participate in, the May 2001 bankruptcy auction of various property and equipment formerly owned by Gulf States Steel. (AF No. 104). Nucor first learned that the Steel Mill Assets at issue in this litigation were to be sold at bankruptcy auction sometime in mid-2002 based on a trade press article reporting that GSRG had submitted a $5 million "stalking horse" bid for those assets. (AF No. 105).

In contrast, Casey was aware of the Gulf States Steel bankruptcy proceeding, and the efforts to sell the property and equipment formerly operated by Gulf States Steel, since at least the summer of 2000. (AF No. 106). For approximately two years prior to the September 2002 bankruptcy auction, Casey had tried repeatedly to get a contract with Gulf States Steel and the Trustee to liquidate the Gulf States Steel property and equipment. (AF No. 107). Casey inspected the

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Gulf States Steel property and equipment on a number of occasions in 2000 and 2001, and was very familiar with those assets. (AF No. 108). Don Casey attended the May 2001 auction on Casey's behalf, bid on several items at the auction, and successfully purchased some of the Gulf States Steel assets that were auctioned. (AF No. 109). Casey also purchased additional assets from the Gulf States Steel bankruptcy estate before the May 2001 auction. (AF No. 110).

Based on articles in the trade press, Casey was aware in mid-2002 that GSRG was trying to purchase the remaining Steel Mill Assets. (AF No. 111). In mid-2002, Don Casey met with representatives of Nucor, in connection with an unrelated project, and mentioned to the Nucor representatives that: (1) the Steel Mill Assets were available for sale; (2) in Don Casey's opinion, the value of the Steel Mill Assets was substantially more than the $5 million price that GSRG reportedly was willing to pay; and (3) this was an excellent business opportunity that should be pursued. (AF No. 112).

Sometime later, Joe Rutkowski ("Rutkowski") of Nucor and Don Casey had several telephone discussions regarding the Steel Mill Assets during which Casey advised Nucor that, in his opinion: (1) the salvage/scrap value of the assets was in the range of at least $7-8 million; (2) certain of the assets might be usable by Nucor in its production facilities; (3) it might be possible to resell some of the more significant assets in the export market at a very substantial profit; (4) the Asian market, in particular, was very "hot" at that time;[4] and

4. The court recognizes that Plaintiff disputes the representation that there was a "hot" market for used Steel Mill Assets in China or anywhere else in 2002. However, this statement of fact clarifies that the information was part of Casey's opinion and his view of the market is not otherwise controverted in the record.

(5) Casey would be interested in developing the real property at the Gulf States Steel site into an industrial park at its own expense. (AF No. 113).[5]

Don Casey and Rutkowski reached an agreement in principle that: (1) Casey would attempt to purchase the Steel Mill Assets at the September 16, 2002 public auction with Nucor to provide the funding, up to a maximum of $8 million, for acquisition of the physical assets; (2) Nucor would have the first option to acquire the equipment and other personal property for its own use; (3) Casey would be given the option at its own expense to acquire the real property to be used as an industrial park; (4) Casey would have a period of several years to attempt to resell the key Gulf States Steel assets (*e.g.*, hot strip mill, plate mill) for a substantial premium in the attractive export market; (5) Nucor and Casey would split the proceeds of any resale on a 75%-25% basis; and (6) if Casey was unsuccessful in reselling the assets, Nucor would take back the assets for their salvage/scrap value. (AF No. 114). The agreement in principle between Don Casey and Rutkowski was subsequently reduced to a letter agreement dated September 11, 2002, which included a fixed $8 million cap on any bid by Casey at the auction. (AF No. 115).

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5. The court notes that Plaintiff points to evidence that Joe Rutkowski testified that he called Casey after reading the article in the American Metal Market reporting on GSRG's intent to reopen the plant. The court disagrees that this testimony creates a material dispute of fact because Plaintiff has done nothing to create a factual dispute and undermine Defendants' position that the telephone conversation and the meeting occurred on separate occasions (albeit in the same time period).

From both Nucor and Casey's perspectives, the financing arrangement had a tremendous upside potential with little downside risk. Nucor believed there was great upside based upon the resale of the assets to the Asian market, and little downside risk since its exposure was capped at $8 million, which it believed to be roughly the estimated salvage/scrap value of the Steel Mill Assets.[6] (AF No. 116). From Casey's perspective, the arrangement with Nucor had a tremendous upside based upon resale of the assets in the export market, and the only risk was the investment of its time and effort. (AF No. 117).

D. Nucor's Perception of GSRG

GSRG's "stalking horse" proposal to purchase the Steel Mill Assets for $5 million, which would be provided entirely by the local Development Authority, indicated to Nucor that GSRG was not a viable business plan. (AF No. 118). The entire plan was speculative and premised upon obtaining the Steel Mill Assets (using other people's money) for several million dollars less than their fair market value. (AF No. 118). The possibility that GSRG might attempt to re-open the plant was not discussed between Casey and Nucor. (AF No. 120). Nucor believed that the Steel Mill Assets were likely to be worth much more than $5 million, particularly if resold overseas in the Asian market which was viewed by Nucor as "very, very hot" for used steel-making equipment.[7] (AF No. 122).

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6. The court acknowledges that Plaintiff challenges the value of the Steel Mill Assets as scrap. However, the statement of fact is limited to Nucor's perspective, and nothing in the record refutes that Nucor held this belief in good faith.

7. *See* n. 5, *supra.*

Appendix B

E. Resale of the Assets

Casey's affiliated company, Park, won the September 16, 2002 bankruptcy auction with a final cash bid of $6.3 million. (AF No. 123). Casey and Nucor agreed that the value of the real property, which Casey purchased at its own expense, was $150,000. (AF No. 124). Under the parties' agreement, Nucor provided $6.15 million in financing to Park for the final purchase of the Steel Mill Assets. (AF No. 125). Nucor made a very substantial profit on its investment, more than doubled its money in about a year and a half, and made more money on the deal than GSRG was even willing to bid at the September 16, 2002 auction. (AF No. 126). Casey has opened an industrial park on the real property that it acquired as part of the Steel Mill Assets and made a substantial commission on the resale of the remaining plant and equipment to clients in Asia. (AF No. 127).

F. Plaintiff's Counterstatement of Material Issues[8]

In response to Defendants' Statement of Facts, GSRG has identified four issues for the court to consider. (*See generally* Doc. # 88). First, Defendants contend that their facts support an inference that Nucor's facilitation of Casey and Park's purchase of the Steel Mill Assets was a "good faith business arrangement," while GSRG contends that the terms and conditions of the contract between Nucor and Casey, and other material facts set forth below, support an inference of anti-competitive intent, and further the

8. To the extent they are potentially material, the court will hereafter address the specific facts identified by Plaintiff in support of its counterstatement of material issues.

assertion that Nucor's action in backing the establishment of a direct competitor caused an illegal anti-competitive effect. (Doc. # 88 at Factual Issue # 1). Second, GSRG disputes that the bankruptcy court, in evaluating Park's bid, had the opportunity to give consideration to the potential anti-competitive effects of Park's purchase of the assets on behalf of Nucor, and the legality of such purchase under the antitrust laws, given Park's counsel's denial of involvement of Nucor.[9] (*Id.* at # 2). Third, Plaintiff questions whether (1) as of June 2002, when the sale of the Steel Mill Assets was negotiated between GSRG and the bankruptcy trustee, the fair value of such assets, as contended by GSRG, was $5 million, or as contended by Defendants, substantially more than $5 million, and (2) the price of the sale of the Steel Mill Assets by Casey to Asian buyers in July and August of 2003 reflects a major shift in the steel market between 2002 and 2003, rather than the value of the assets in 2002. (*Id.* at # 3). Fourth, in its brief, GSRG contends that Nucor's representation that "the salvage/scrap value of the assets alone was worth some $7-8 million" is inaccurate and that given the market conditions in the summer of 2002, the assets had an actual value less than the cost of the labor it would have taken to prepare them for the scrap market. (*Id.* at # 4).

III. SUMMARY JUDGMENT STANDARD

Summary judgment is an integral part of the Federal Rules of Civil Procedure and is the prescribed manner by

9. The court agrees with GSRG in part. It was not the task of the bankruptcy court to examine the potential anticompetitive effect of Park's purchase. That court was called upon to ensure that the process was open, fair, and functionally competitive.

which claims which do not involve genuine issues of material fact should be resolved. Fed.R.Civ.P. 56. The fact that the parties do not agree on every fact is not significant. The law requires only that "there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A factual dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 251. Whether a fact is material is determined by the substantive law applicable to a particular case. *See Anderson*, 477 U.S. at 248. Although the nonmovant is entitled to justifiable inferences from the undisputed facts, he cannot rest upon his pleadings. Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed.R.Civ.P. 56(e).

IV. DISCUSSION

GSRG contends that this is a market exclusion case. For purposes of Defendants' motion, there is no dispute that Nucor possesses dominance in the relevant market of hot rolled coil in the Southeast region of the United States.

(*See* Doc. # 94 at p. 2 n. 1). Likewise, it is undisputed that Defendants had nothing to do with the closing of the steel plant, which was owned and operated by Gulf States Steel. That plant was closed and removed from the steel market in August 2000.[10] Rather, the focus in this case is on whether Defendants' purchase of the steel-related assets of Gulf States Steel in the bankruptcy court violated federal antitrust laws. Defendants attack those claims head on and contend that they are entitled to summary judgment for three independent reasons: (1) GSRG has failed to establish causation; (2) GSRG lacks antitrust standing because it has not suffered any antitrust injury; and (3) there is an absence of anti-competitive activity by Defendants. For the reasons stated below, the court finds that Defendants are entitled to summary judgment.

A. GSRG Has Not Shown That Defendants' Actions Caused GSRG's Alleged Injuries

In order to establish an antitrust claim, a plaintiff must show causation-in-fact. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Met, Inc* ., 429 U.S. 477, 489 (1977). The Supreme Court and other courts have long recognized that antitrust claims are tortious in nature, and that common-law principles governing tort claims are equally applicable to antitrust claims. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532-33 (1983)

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10. The record suggests that it was a sudden downturn in the United States steel industry that caused Gulf States Steel to seek protection under the Bankruptcy Code. When it failed to reorganize under Chapter 11, its bankruptcy was converted to a Chapter 7 liquidation.

(finding proximate causation and other common-law limitations on damages are applicable in antitrust context); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 848 (11th Cir.1988) (citing *Myers v. American Dental Ass'n*, 695 F.2d 716, 723 (3rd Cir.1982) (for the premise that antitrust claims are, in essence, "forms of torts alleging business injury")); *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n. 4 (5th Cir.1976) (noting that defendants in an antitrust action may be held jointly and severally liable as joint tortfeasors).

One of the common-law principles governing tort claims that applies in the antitrust context is the requirement that the plaintiff demonstrate that the defendant actually caused the alleged injury. *See Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1459, 1462 (11th Cir.1991) ("A private party seeking to invoke the antitrust laws must show that the defendants caused the alleged injury. . . . As with other causes of action that are tortious in nature, failing to show causation is fatal to a Section 1 [of the Sherman Act] claim")[11] (internal citations omitted); *Cable Holdings of GA., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1561-62 (11th Cir.1987) ("To recover under the antitrust laws, a plaintiff must prove that a defendant's illegal conduct materially contributed to his injury. Proof of a violation of the Sherman Act standing alone does not establish civil liability"). Thus, to survive the Defendants' motion for summary judgment, GSRG must proffer sufficient evidence to permit a fact-finder to reasonably infer that Defendants' actions actually caused the injuries that GSRG alleges in support of its antitrust claims.

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11. The Eleventh Circuit also applied this same proof requirement to a plaintiff's Section 2 claims.

Appendix B

Here, the undisputed evidence demonstrates that GSRG's alleged injuries were self-inflicted-they occurred as a result of its own failed bidding strategy. Park's $6.3 million conforming bid in the September 16, 2002 auction caused it to win a fair and open bankruptcy court-supervised auction and allowed it to take possession of the Steel Mill Assets.[12] Those assets were subsequently resold at a substantial profit. Obviously, in order for Park to have won at the auction, it was necessary for GSRG to have lost. And it was that loss which rendered GSRG ineligible to take possession of the Steel Mill Assets.

That these events (*i.e.*, Park's winning and GSRG's losing) are in some way correlated does not mean-logically or legally-that Park's winning bid "caused" GSRG's alleged antitrust injuries.[13] Even more importantly, it does not show

12. The bankruptcy court has the power, in appropriate circumstances, to refuse to confirm a winning bid at a public auction held pursuant to court order where, for example, the sales price is grossly inadequate. *In re Muscongus*, 597 F.2d 11, 12 (1st Cir.1979). Moreover, Bankruptcy Code § 363(n) permits a sale to be avoided if there was an agreement to bid among potential bidders. The estate can recover (1) any amount by which the value of the property sold exceeds the price at which such sale was consummated, (2) attorneys' fees and costs, and (3) punitive damages for a willful disregard to § 363(n).

13. As Defendants note: "To accept such a proposition would mean that the Trustee's acceptance of Park's higher bid 'caused' the alleged injuries; that the Trustee's rejection of GSRG's nonconforming part credit/part cash bid 'caused' the alleged injuries; that the bankruptcy's court's approval of the acceptance of Park's higher bid 'caused' the alleged injuries; and that the bankruptcy court's institution of an auction in which winning and losing were mutually exclusive 'caused' GSRG's alleged injuries." (Doc. # 83 at p. 13).

that Defendants engaged in any anti-competitive activity that caused GSRG to lose at the auction. Rather, as the record amply demonstrates, it was GSRG's own actions (and inactions) which, separately and cumulatively, caused GSRG's alleged injuries. First, GSRG failed to purchase the Steel Mill Assets at the May 2001 auction, even though it admits it could have done so for only $7.1 million. Second, Park's $6.3 million bid prevailed even though GSRG could have bid more for the assets, but made a business decision not to do so. Third, despite the explicit advice it received from its bankruptcy counsel that "credit bidding won't work," GSRG placed a $7 million part credit/part cash bid at the September 16, 2002 auction on the advice of GSRG's General Counsel, who was admittedly not a bankruptcy expert. That bid was properly rejected by the Trustee as non-conforming. Fourth, GSRG refused to submit a higher, conforming bid when given "every opportunity" to do so by the Trustee. Finally, GSRG admits that it could easily have made a cash bid-of up to $8.1 million-that would have caused it to be the winner and Park the loser.

GSRG has pointed to no facts showing any actions by the Defendants contributing to GSRG's failures. There is no evidence that Defendants interfered with GSRG's ability to: (1) bid at the original May 2001 auction; (2) obtain financing, to understand the auction bidding procedures, to understand the Bankruptcy Code or to follow its bankruptcy attorney's advice that "credit bidding won't work" at the September 2002 auction; or (3) make additional conforming bids at the latter auction. As for GSRG's nonconforming bids, it was its non-compliance with the Bidding Procedures Order, negotiated with the input of GSRG and approved by the

bankruptcy court, that prevented GSRG from obtaining the Steel Mill Assets, not the Defendants.

GSRG's situation is very similar to a case decided by the Eighth Circuit twenty years ago. *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444 (8th Cir.1985). In that case, television station and cable operator WCCO was an unsuccessful bidder for sports programming and sued claiming antitrust violations. The losing bidder had a right of first refusal in its contract for telecast rights with the Minnesota Twins. When notified of a competing bid by Spectrum for a package of Twins and Minnesota North Stars programming, WCCO placed an inferior bid (it did not match the Spectrum bid because it left out the North Stars altogether). The Twins and the North Stars informed WCCO that they found its offer inferior to Spectrum's, but WCCO refused to substantially alter its original proposal. Consequently, the teams rejected WCCO's bid and accepted Spectrum's bid.

The case proceeded to trial and a jury found in favor of WCCO and against the Twins and the North Stars.[14] The district court granted a judgment notwithstanding the verdict dismissing WCCO's antitrust claims. The Eighth Circuit affirmed the dismissal because "the loss was not attributable to or caused by an antitrust violation." *Id.* at 452 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977)). As the court stated:

> WCCO did fail to gain the sports telecast rights it sought. But, as the District Court concluded, this

14. The jury found the teams engaged in illegal tying and pooling arrangements.

> loss was likely regardless of whether [the Twins and North Stars] engaged in a tying arrangement. Spectrum simply was willing to pay the teams more for their telecast rights.

Id. at 451. The court found that "[t]he causal connection between the alleged antitrust violations and WCCO's asserted injury is tenuous at best." *Id.* Instead, *"WCCO's loss stemmed from its failure to make the most satisfactory bid-a type of loss that always occurs when a transaction involves multiple bidders." Id* . at 451-52 (emphasis added) (footnote omitted); *see also Classic Communications, Inc. v. Rural Telephone Service, Inc.*, 995 F.Supp. 1185, 1186 (D.Kan.1988) (finding that unsuccessful bidder lacked standing to bring antitrust claim where agreement between successful bidders may have affected the individual competitor, but did not affect all of the competitors' ability to fairly compete).

In this case, just as in *Midwest Communications*, it was the losing bidder's shortcomings-that is, its own self-imposed cash bidding limit-that caused it to lose the auction.[15] *Midwest Communications*, 779 F.2d at 452. Indeed, in this respect this case is similar to *Brunswick* (analyzed in more detail *infra*) because, if another entity (besides Park) had outbid

15. It is not lost on the court that GSRG's self-imposed bidding limit approximated its outside financing from the Development Authority and Jefferson Metal so that GSRG itself would put none of its own money at risk. As Defendants note in their reply brief, "[b]ecause GSRG was attempting to re-open a plant that (1) had previously failed and (2) the bankruptcy court found could not be reorganized and should be liquidated, it was certainly not irrational for Mr. Williams to use only 'other peoples' money' and to refuse to put any of his own money at risk." (Doc. # 99 at p. 4, n. 2).

GSRG, GSRG would have suffered the same "loss." *Brunswick*, 429 U.S. at 487-88. As Professor Areeda has stated, a "plaintiff may not recover for injuries that were not clearly attributable to the defendant's acts or that were self-inflicted or the result of the plaintiffs' own mismanagement." III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Laws* § 657a, at 113 (2d Ed.2002); *see also Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F.Supp.2d 558, 570-71 (W.D.Va.2001) (denying plaintiff's claim because of, among other things, plaintiff's unwillingness to pay the good-faith minimum price offered by the defendant). There is simply no causal nexus between any allegedly improper action by the Defendants and GSRG's loss, *i.e.*, its failed attempt to acquire the Steel Mill Assets. GSRG failed to prevail at a free and open public auction.[16] And it was the failure of GSRG to make a higher conforming bid, or to make a subsequent $7 million bid in a conforming manner, rather than any action on the part of the Defendants, that was the only "cause" of GSRG's alleged "harm."

Based upon the court's analysis, it should come as no surprise that the court finds GSRG's attempt to distinguish

16. Defendants also contend that GSRG's bid limit was below the fair market value of the property as set at the public auction and it was GSRG's ally, Mike McCain of the Development Authority, that asked an Italian steel firm (Palini é Bertoli), which had expressed interest in purchasing the Steel Mill Assets, to work with GSRG and Frank Williams regarding the potential sale. Further, GSRG and Palini é Bertoli specifically discussed their bidding strategies before the auction. (AF No. 34). These facts come the closest in this case of hinting at anticompetitive behavior. Ironically, none of the facts involve Defendants' conduct, but rather that of GSRG.

Midwest Communications wholly unavailing. Moreover, its arguments regarding the District Court of Kansas' decision in *Classic Communications* are equally off the mark. In *Classic Communications*, after failing to prevail in a bid for a Sprint/United telephone system, Rural Telephone asserted an antitrust counterclaim against Classic Communications. Rural alleged that, but for a horizontal noncompete agreement between Classic Communications and another company (Pioneer Telephone) that permitted Classic Communications to increase its bid, Rural's bid for certain Sprint/United telephone exchange assets would have been successful. The court described the allegations as follows:

> The heart of Rural's antitrust claim is that the Classic/Pioneer agreement enabled Classic to outbid Rural for the Sprint/United telephone system. Rural attempts to establish the anticompetitive effect of the Classic/Pioneer agreement by alleging that it caused Rural to suffer damages as a result of losing the bid for the telephone system.

Id. at 1187. The court summarily dismissed Rural's antitrust claim on grounds that "Rural's alleged injury does not result from a reduction in competition and, therefore, is not the type of injury for which the federal antitrust laws were intended to redress." *Id.* Rural was simply a sore loser and could make no allegation "that Classic's conduct hampered Rural's ability to compete" for the purchase of the Sprint/United assets. *Id.* In particular, the court found that:

> Rural's allegation that the nature of the [Classic/Pioneer] agreement was anticompetitive is

> contradicted by its allegation that, but for the agreement, Sprint/United *would have received a lower price for [the] telephone system offered for sale.* Rural is essentially saying that, but for the agreement, *it would have had no serious competition* for the Sprint/United telephone system.

Id. (emphasis added). The court correctly held that such a claim *"would thus be contrary to the purpose of the antitrust laws"* and that "the allegations in Rural's antitrust counterclaim, taken as true, are not sufficient to state antitrust standing." *Id.* (emphasis added).

GSRG asserts that the *Classic Communications* decision is inapposite because in that case Rural Telephone was already an established firm in the geographical market at issue, but the other firm (Classic Communications) desired to enter the market through an acquisition of existing telephone exchanges being sold off by Spring/United. In making that argument, GSRG misunderstands its status in this case. Similar to Classic Communications, it is a firm that desired to enter the marketplace at issue, but was stymied because it did not have the highest qualified bid. *See Classic Communications*, 995 F.Supp. at 1186.[17]

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17. It is important to understand in this regard that Gulf States Steel is not GSRG. Gulf States Steel, which operated the steel mill in Gadsden, Alabama until 2000, went into bankruptcy never to return. GSRG was formed in January 2001 (by persons formerly associated with Gulf States Steel) to purchase the Steel Mill Assets. It desired to reopen the closed plant. Thus, at the time GSRG was incorporated, the Gadsden steel mill was not operating in the market and GSRG's status is more like a new entrant who desired to enter the market by reopening the mill.

For the reasons outlined above, the court concludes that summary judgment in favor of Defendants is appropriate because GSRG cannot show causation-in-fact.

B. GSRG Did Not Suffer Any "Antitrust Injury" And, Therefore, Lacks Antitrust Standing

At its core, this lawsuit represents GSRG's attempt to undo its loss in a competitive, free, and open bankruptcy auction by exacting treble damages against the winning bidder. For this, and other reasons outlined below, GSRG has not shown that it suffered any "antitrust injury" and therefore, it lacks antitrust standing.

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." 15 U.S.C. § 15(a). In order to recover for alleged violations of the antitrust laws, a plaintiff must establish that it has "antitrust standing." Of course, a mere reference to the broad language of Section 4 does not suffice to confer antitrust standing. *Associated Gen'l Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 (1983); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir.1991). Instead, courts must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated Gen'l Contractors*, 459 U.S. at 535.

The Eleventh Circuit has adopted a two-prong approach in deciding whether a plaintiff has antitrust standing. *Florida Seed Co., Inc. v. Monsanto, Inc.*, 105 F.3d 1372, 1374 (11th Cir.1997), citing *Municipal Utils. Bd. of Albertville v.*

Alabama Power Co., 934 F.2d 1493, 1499 (11th Cir.1991). First, the plaintiff must establish that it has suffered "antitrust injury." *Municipal Utils. Bd. of Albertville*, 934 F.2d at 1499. Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws.

The concept of "antitrust injury" cited in *Todorov* derives from the Supreme Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra.* In antitrust cases, a plaintiff:

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Brunswick Corp., 429 U.S. at 489; *see also Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 109 (1986) (summarizing *Brunswick Corp.*). An antitrust injury is one caused by action that the antitrust laws forbid. *See Indium Corp. v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed.Cir.1985). "As the Supreme Court has made clear, to have standing antitrust plaintiffs 'must prove more than injury causally linked to an illegal presence in the market [*i.e.*, but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Florida Seed*, 105 F.3d at 1374, quoting *Brunswick Corp.*, 429 U.S. at 489. "[A]ntitrust injuries include only those injuries that result from interference with the freedom to compete." *Johnson v. University Health Servs., Inc.*, 116 F.3d 1334, 1338 (11th Cir.1998).

Appendix B

In *Brunswick Corp.*, three small competing bowling centers charged Brunswick with antitrust violations because Brunswick, a large corporation with "deep pockets," was purchasing and operating bowling centers that had defaulted on loans from Brunswick. Instead of closing the bowling centers and selling off the assets, Brunswick kept many of the bowling centers open. According to the Court, the sole injury alleged by the plaintiffs was that the open centers continued to compete with them. *Brunswick*, 429 U.S. at 488.

In reversing the district court's denial of Brunswick's motion for judgment notwithstanding the verdict, the Court stated that the plaintiffs "would have suffered the identical 'loss' but no compensable injury had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents." *Id.* at 487. Therefore, the difference in profits that may have resulted from the plaintiffs not having any competitors (*i.e.*, if the centers had just gone out of business and had not been acquired and operated by Brunswick) "was not [injury] of 'the type that the [antitrust] statute was intended to forestall." ' *Id.* at 487-88 (quoting *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967)). As the Court stated, antitrust plaintiffs must "prove more than injury causally linked to an illegal presence in the market." *Id.* at 489. The antitrust laws exist for "the protection of competition not competitors." *Id.* at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).[18]

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18. Palini é Bertoli did not bid after it and GSRG discussed their bidding strategy with one another. If GSRG's efforts to effectively exclude Park as a bidder were successful, it would have become the only firm to have bid on the Steel Mill Assets.

Similarly, here, GSRG has not suffered any "antitrust injury"-the type of injury the antitrust laws stand to protect. Taking the evidence in the light most favorable to GSRG, all that can be shown is that GSRG was the losing bidder at a fair and open bankruptcy court-supervised auction. GSRG's failure to prevail at the auction is not an "antitrust injury." If any other bidder in the bankruptcy auction (*e.g.*, Palini é Bertoli) had prevailed, its bid would have placed GSRG in the exact same position that it is in today-a corporation that failed in its attempt to acquire the Steel Mill Assets and was therefore, without any operating assets.[19] GSRG's alleged "injury" stems not from an reduction or elimination of competition; rather it derives solely from a claim that there was "too much" competition at the auction and, because of that competition, it could not use taxpayer's money to appropriate the Steel Mill Assets for a below-market price.

Accordingly, for the reasons outlined above, GSRG cannot establish it suffered an antitrust injury and, for that reason, Defendants are entitled to summary judgment.

C. GSRG Has Failed To Show Any Conduct By Defendants That Violated the Antitrust Laws

As the court has already concluded, GSRG has pointed to no evidence of causation and has not shown that it has suffered any "antitrust injury." These findings, no doubt, are

19. The Asset Purchase Agreement for the $5 million sale of the Steel Mill Assets-which was struck before the 2002 auction among GSRG, the senior secured creditor, and the bankruptcy Trustee-was by its very terms subject to bankruptcy court oversight, objections, and the triggering of a bankruptcy auction.

a consequence of the unassailable conclusion that Defendants' decision to place a bid on the Steel Mill Assets and their win at the court-sponsored auction did not impair any competition nor GSRG's ability to compete for the purchase of those assets in any manner. Competition was not injured by any action of the Defendants. Rather, the auction, and Defendants' participation in it, fostered competition. This is yet another independent reason for granting Defendants' motion.

It is axiomatic that in an antitrust action, there must be some evidence that the defendant "caused" some harm to competition. "Harm to competition is a necessary element of all private antitrust suits under Sections 1 and 2 of the Sherman Act." *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579 n. 8 (11th Cir.1985) (quoting *Brunswick Corp.*, 429 U.S. at 488). "It is only when the market is being distorted by anticompetitive conduct that the antitrust laws should be invoked." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir.1991). In this case, it has been shown that Park's $6.3 million bid caused Park to win the auction and to take possession of the Steel Mill Assets. Even assuming *arguendo* that this winning bid could be said to have "caused" GSRG's alleged injuries-in-fact, the record in no way shows any action by Defendants that hindered GSRG's ability to compete. Indeed, the parties' participation in an open bankruptcy court-sponsored auction-and the very existence of such a functionally proper and fair capital asset auction-aids competition, it does not impede it. In this factual context, participating and prevailing in a full and fair bankruptcy auction can only be described as "competition on the merits." *Cf. Olympia Equip. Leasing Co. v. Western*

Union Tel. Co., 797 F.2d 370, 379 (7th Cir.1986) ("Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants"). Fair market bidding, in and of itself, cannot be the illegal act and cannot give rise to cognizable "antitrust injury." If GSRG's view prevailed in this case, the bankruptcy auction would not have been as functionally competitive and open, the bankruptcy creditors would have been disadvantaged,[20] and the purchase price[21] would have been artificially depressed. That is, the price ultimately paid for the Steel Mill Assets would not have been as high because one of the interested bidders-indeed the winning bidder-would have been ineligible to bid.

The undisputed facts show that Casey and Nucor had been doing business together for many years and had previously bought and sold used steel-related equipment. They learned about GSRG's below-market $5 million "stalking horse" bid for the Steel Mill Assets while reading the trade press in mid-2002. Casey and Nucor concluded that price was low given the value of the assets, estimated that

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20. In fact, the Gulf States Steel bankruptcy creditors would effectively have subsidized GSRG's purchase of the Steel Mill Assets at a price of more than $1 million below the ultimate winning bid.

21. The parties have spent some time in their briefs arguing about whether GRSG's offer of $5 million was "below market." The court does not believe that is a dispositive issue in this case. It is enough to say that GSRG's initial offer was well below the sales price achieved at a fair and competitive auction and, in any event, GSRG had the resources to still win the day by topping Park's bid with a higher conforming bid but, for business reasons, opted not to do so.

the salvage/scrap value of the assets was some $7-8 million, and predicted that a huge upside profit could be made by reselling the key equipment in the Asian market which they believed to be "very hot."[22] Defendants entered a good faith business arrangement to participate in the auction- *up to a fixed $8 million cap*-that had little or no downside and huge potential profit upside when the assets were resold in Asia. As GSRG admits, it could have bid $8 .1 million to win the auction, but made a "business decision" not to do so. Nucor and Casey are guilty of nothing more than attempting to make a profit by buying low and selling high in the market for used capital assets.[23]

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22. Moreover, GSRG's assertion that Defendants' position is undermined because they could not sell to China at the time of the deal is without merit. The undisputed testimony and underlying three-year contract make clear that Defendants *believed* they could make a substantial profit if they were patient and sold in Asia in the next few years. (*See* Casey Dep. at 18; Rutkowski Dep. at 15, 22). That is exactly what they did. Such is the type of business acumen that the antitrust laws are designed to foster, not prohibit. *See, e.g., United States v. Grinnell*, 384 U.S. 563, 570-71 (1966) (encouraging "growth or development as a consequence of . . . business acumen"). Moreover, the Defendants' reasonable (and time-proven) expectation that there would be an upturn in the global steel market is fully confirmed by GSRG's own expectations underlying its business plan.

23. There is no allegation here that Park's bid was predatory, or involved "the immediate sacrifice of profits through unreasonable" prices or actions, as Professor Areeda has described it. Phillip E. Areeda *et al., Antitrust Law: An Analysis of Antitrust Principals and their Application*, vol. III, § 723a, 272. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n. 8 (1986). In fact, the undisputed facts show a number of reasons why Park's

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As the bankruptcy court concluded, the Casey-Nucor deal was thus an entirely sensible, good faith business arrangement between two companies (which operate in completely separate markets) to pursue jointly a business opportunity to buy and resell certain used assets at a substantial profit. As GSRG also admits, there is nothing wrong or illegal about such a deal or the use of non-recourse financing as the funding mechanism. Nowhere in the Rule 56 record is there any evidence or suggestion that there was a conspiracy among competitors, or that Defendants conspired with the Trustee to dupe GSRG, interfered with GSRG's financing, adversely affected GSRG's business operations or bidding strategy, or undertook any fraudulent, tortious, or otherwise illegal action, either in general or with respect to GSRG.[24] In fact, the

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winning $6.3 million bid cannot be deemed predatory: (1) the original reserve price at the May 2001 auction was $7.1 million; (2) GSRG's subsequent, but nonconforming, bid was for $7 million; (3) an independent appraiser appraised the Steel Mill Assets at $19 million; (4) GSRG represented to potential investors that the assets were worth $19-22 million; and (5) Casey ultimately arranged for resale of the assets on the used capital asset market for some three times the purchase price paid in the auction.

24. Without any evidence of duplicitous, fraudulent or tortious behavior on the part of Defendants, the court is left with the undisputed fact that Defendants' actions actually promoted competition. Defendants' actions added one bidder to the bankruptcy auction, thwarted an insiders' scheme to purchase the Steel Mill Assets at a below-market price, and increased the ultimate sale price received by the Trustee for the Steel Mill Assets. *See Classic Communications, Inc.*, 995 F.Supp. at 1187 (finding that the losing

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bankruptcy court found otherwise. *See* Bankruptcy Order at 515 (finding that "there was no collusion or bad faith motive on the part of the Trustee or any bidder in connection with the Sale Motion"). Nor is there any evidence that Nucor used its market power to outbid GSRG at the bankruptcy auction. Indeed, GSRG readily admits that (1) it had sufficient assets to have won the auction and (2) if it had used those assets it would have won the auction. This is another indication that neither Nucor specifically, nor any of the other Defendants generally, used market power to act anti-competitively.[25]

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bidder's "alleged injury [did] not result from a reduction in competition"). Defendants' actions were neutral towards GSRG with one obvious and appropriate exception: as in any auction and in all robust markets, opposing bidders are competitors. Defendants' actions, then, did not distort the market or harm competition in the auction. Without any action that diminishes competition, there is no antitrust claim. *See, e.g., Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1545 (11th Cir.1996) ("The Supreme Court long ago determined that section 1 prohibits only those agreements that *unreasonably* restrain competition."); 72 F.3d at 1549 (affirming summary judgment on price fixing allegation because there was no evidence that the alleged actions "facilitat[ed] any agreements among its provider panel members *to restrict price or any other forms of competition."*) (emphasis added); *Phillips Getschow Co. v. Green Bay Brown County Prof. Football Stadium Dist.*, 270 F.Supp.2d 1043, 1048-49 (E.D.Wis.2003) (dismissing antitrust claim by losing auction bidder where conduct actually increased competition and the increased competition caused plaintiff's alleged injuries).

25. GSRG's assertion that Nucor participated in the 2002 auction because it knew GSRG was going to re-open the mill is not only wholly unsupported in the record, but there is direct sworn

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When boiled down to its essence, GSRG's real complaint in this case relates to its failure to top Defendants' successful $6.3 million bid for the long-dead Gadsden assets. That is its real protestation, and its market exclusion arguments cut no ice at all.[26] An antitrust "foreclosure" theory requires that

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testimony by both Nucor and Casey to the contrary. *See* Deposition of Carrie Casey at 15-17, 36; Deposition of Joe Rutkowski at 12-15. GSRG's argument is nothing more than an incantation that "we don't believe the testimony." A party cannot defeat summary judgment on this basis. *See, e.g., Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."); *Monroe v. Children's Home Ass'n.*, 128 F.3d 591, 593 (7th Cir.1997) ("[A] plaintiff must prove, and not just assert"). Rather, "the party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and . . . the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Curl v. International Business Machines Corp.*, 517 F.2d 212, 214 (5th Cir.1975) (citations omitted). Indeed, a court "may not weigh evidence and evaluate the credibility of the witnesses at the summary judgment state." *Ultimax Transp., Inc. v. British Airways, Inc.*, 231 F.Supp.2d 1329, 1335 (N. Ga.2002).

26. Indeed, as noted by Defendants in their reply brief:

> All of GSRG's cited cases revolve around either: (1) foreclosures arising from otherwise tortious or illegal acts or per se antitrust violations, *see, e.g., Perryton Wholesale, Inc. v. Pioneer Distrib. Co.*, 353 F.2d 618 (10th Cir.1965) (tortious interference with existing contractual relations); *Int'l Travel Arrangers, Inc. v.*

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the alleged monopolist/conspirators take wrongful actions which actually preclude competition in relevant markets. *E.g., Santana Prods. Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132 (3d Cir.2005) (noting that without a "restraint," there is "no restraint of trade;" summary judgment affirmed where no allegations of "coercive measures that prevented the [plaintiff]" from competing). Here, Defendants took no wrongful actions, but merely submitted an objectively reasonable, non-exclusionary bid in a court-supervised bankruptcy auction. To the extent that GSRG was "precluded" from entering the market, that occurred because of its own actions. GSRG's failure to meet the bid price arose out of either a deliberate commercial choice or a misunderstanding of bankruptcy procedure. But it was not due to any antitrust violation.

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> *W. Airlines, Inc.*, 623 F.2d 1255 (8th Cir.1980) (use of false, misleading and deceptive advertising and threats of refusals to deal); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (territorial allocation and refusal to deal); or (2) the destruction of existing competition by a conspiracy of horizontal competitors, often as part of trade association activities, *see, e. g.*, *ES Dev., Inc. v. RWM Enters.*, 939 F.2d 547 (8th Cir.1991) (parallel actions of nine existing competitors); *Am. Med. Ass'n v. United States*, 317 U.S. 519 (1943) (use of trade association.)

(Doc. # 94 at p. 7).

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V. CONCLUSION

For the reasons outlined above, the court finds that there are no material factual disputes and that Defendants are entitled to judgment as a matter of law..Accordingly, the court will enter a separate order granting Defendants' Motion for Summary Judgment and dismissing this action with prejudice.

DONE and **ORDERED** this 30th day of September, 2005.

s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ALABAMA, EASTERN DIVISION DATED SEPTEMBER 27, 2002

UNITED STATES BANKRUPTCY COURT
N.D. ALABAMA
EASTERN DIVISION

No. 99-41958-JSS-7

In re GULF STATES STEEL, INC. OF ALABAMA,

Debtor.

Sept. 27, 2002

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING TRUSTEE'S MOTION FOR AN ORDER AUTHORIZING SALE OF PROPERTY OF THE ESTATE FREE AND CLEAR OF LIENS AND OTHER INTERESTS

JAMES S. SLEDGE, Bankruptcy Judge.

The Motion of James Henderson as the Chapter 7 Trustee of the bankruptcy estate of Gulf States Steel, Inc. of Alabama (the "Trustee") For An Order Establishing Bidding And Other Procedures In Connection With Sale Of Property Of The Estate Free And Clear Of Liens And Other Interests And Motion For Authority For Such Sale (the "Sale Motion") came on regularly for hearing on August 21, 2002, with respect to bidding procedures and related matters, and again on September 16, 2002, in order to confirm the results of the

auction conducted by the Trustee and to consider whether the Trustee should be authorized to complete the sale of the subject Steel Mill Assets (as defined below). Both hearings were conducted before the Honorable James S. Sledge in the above-entitled court. After having considered the Sale Motion and the accompanying Memorandum of Points and Authorities, the various other pleadings filed in support of, and in opposition to, the Sale Motion, and reflected on the docket of this case, the testimony presented at such hearings, and the arguments of counsel appearing at such hearings, as reflected in the record of this matter, the Court makes the following findings of fact, conclusions of law, and orders:

Findings of Fact

1. The debtor, Gulf States Steel Inc., of Alabama ("debtor" or "Gulf States Steel") commenced this case as a chapter 11 case on July 1, 1999. Shortly thereafter, Gulf States Steel obtained interim and final orders (the "DIP Financing Orders") from this Court granting the motion of Gulf States Steel to obtain postpetition secured financing from Ableco Finance LLC, as agent for certain other lenders ("Ableco"), in the approximate amount of $17 million (the "Ableco Loans"). The DIP Financing Orders, among other things, provided Ableco with a superpriority administrative claim and a lien and security interest upon all assets of the debtor's estate of first priority (with certain minor exceptions noted in the Ableco loan documentation). In order to accommodate the Ableco financing, representatives of the holders of the 13 1/2% Series B First Mortgage Notes (the "Secured Mortgage Notes") in the amount of $190 million (with collateral having an assessed value in excess of $180 million)

agreed to subordinate the lien of State Street Bank and Trust Company, as successor in interest to Shawmut Bank Connecticut, N.A., as the indenture trustee ("Indenture Trustee") with respect to such Secured Mortgage Notes, against the property, plant and equipment, and the real property comprising the Gulf States Steel steel mill located in Gadsden, Alabama. In addition to the mortgage liens, the property was encumbered by tax claims and environmental claims.

2. By order entered on July 20, 1999 (the "Preferred Trade Vendor Order"), at the request of Gulf States Steel, this Court authorized Gulf States Steel to enter into arrangements with trade vendors willing to provide Gulf States Steel with certain levels of postpetition unsecured credit ("Preferred Trade Vendors") that provided Preferred Trade Vendors with, among other things, a superpriority claim (junior in priority to that of Ableco) and a lien on the collateral of the Indenture Trustee senior in priority to the lien of the Indenture Trustee (the Indenture Trustee and representatives of the holders of the Secured Mortgage Notes also consented to the subordination of the Indenture Trustee's lien to that of the Preferred Trade Vendors). The parties estimate that the current amount of the Preferred Trade Vendor liens is approximately $7.5 million. The liens in favor of the Preferred Trade Vendors were "collection liens" in that substantial restrictions were placed the ability of the Preferred Trade Vendors to collect upon those liens.

3. Gulf States Steel continued to operate its steel making facilities as a debtor in possession until approximately August of 2000. Prior to that time Gulf States Steel proposed a plan

of reorganization that was dependent upon Gulf States Steel obtaining new financial facilities partially guarantied by the U.S. Government pursuant to the Emergency Steel Loan Guarantee Act of 1999. Gulf States Steel and its proposed lender applied for such a government guaranty. The Emergency Steel Guarantee Loan Board declined to approve a government guarantee.

4. On August 2, 2000, Gulf States Steel filed with this Court its notice of intent to discontinue further operations and commenced limited wind-down operations to complete work in process to finish product.

5. In November of 2000, debtor's chapter 11 case was converted to a chapter 7 case and James Henderson was appointed the chapter 7 trustee.

6. On May 31, 2001, Ableco, acting as the senior secured lender to Gulf States Steel and pursuant to a power of attorney contained in the loan documents approved by this Court, submitted to the Etowah County Board of Equalization (the "Board of Equalization") its objection to the valuation of all the Debtor's real and personal property for the purposes of assessing property taxes (the "May 2001 Objection"). Pursuant to the May 2001 Objection, Ableco objected to the valuation of the real and personal property for tax years 1999, 2000 and 2001.

7. By letter dated September 7, 2001, the Board of Equalization sent to counsel for Ableco their records on values for the Debtor's property for tax years 1999, 2000 and 2001. Based on the records transmitted with such letter,

the Board of Equalization maintained the following values for the Debtor's property: 1999 Real Property-$104,497,212, 1999 Personal Property-$187,234,658, 2000 Real Property-$41,617,183, 2000 Personal Property-$177,446,229, 2001 Real Property-$41,095,747, and 2001 Personal Property-$165,568,098.

8. On May 31, 2002, Ableco submitted to the Board of Equalization its objection to the valuation of all the Debtor's real and personal property for the purposes of assessing property taxes. Pursuant thereto, Ableco objected to the valuation of the real and personal property for tax year 2002, restated the status of the May 2001 Objection and requested that the Board of Equalization notify Ableco of an appropriate time to meet or discuss the objections. The Board of Equalization has postponed all proceedings in connection with such objections and the same have not been resolved.

9. In May of 2001, this Court approved the sale by public auction of numerous items of equipment and the sale by private sale of certain real property and equipment used primarily in the manufacture of steel beams for the mobile home industry (the "Beam Mill") pursuant to Section 363 of the Bankruptcy Code.

10. On July 3, 2002, the Trustee filed the Sale Motion seeking authorization to consummate a sale of approximately 600 acres of real property on which the debtor's former steel operations were located (carving out from the real property to be purchased, among other real property, the real property underlying the coke ovens and melt shop) and substantially all of the debtor's remaining fixtures, plant and equipment

(including the plate mill, the hot roll mill, and the cold roll mill). These assets are further described in the Sale Motion and are referred to herein as the "Steel Mill Assets". This proposed sale was to Gulf States Reorganization Group ("GSRG") for a purchase price of $5 million pursuant to an Asset Purchase Agreement or, alternatively, to the highest bidder pursuant to bidding procedures to be prescribed by the Court. The terms of the Asset Purchase Agreement and the specific bidding procedures were drafted by representatives of the Ableco and GSRG.

11. The Court set an initial hearing on the Sale Motion for August 21, 2002, to consider bidding procedures and other matters. The Court also requested the Trustee and any other parties supporting the Sale Motion to provide further briefing on the issue of the Trustee's ability to sell the Steel Mill Assets free and clear of liens and other interests under § 363 given that the Steel Mill Assets are fully encumbered by the liens asserted against the Steel Mill Assets.

12. On August 19, 2002, Gadsden Industrial Park, LLC (hereinafter "Park") filed its Objection of Gadsden Industrial Park, LLC, a Potential Bidder, to Trustee's Motion for an Order Establishing Bidding Procedures (the "Park Objection") in which Park asserted that competing bids should not be required to be identical in form and as to the assets being purchased in order to be considered by the Trustee.

13. At the August 21, 2002, hearing, the Trustee presented documentary exhibits and testimony on the liens appearing of record against the Steel Mill Assets, the negotiations

between Ableco and GSRG for the purchase and sale of the Steel Mill Assets, and the factors considered by the Trustee in agreeing to certain of the bidding procedures to which objection was made by parties in interest. The proposed bidding procedures provided that competing bidders could only modify the GSRG/Trustee purchase and sale agreement by replacing the name of the purchaser with that of the competing bidder and by increasing the sales price. Ableco and two competing bidders, Gadsden Industrial Park LLC (a newly formed Delaware limited liability company) and Palini e Bertoli (an Italian firm in the steelmaking business) objected to such restrictions being placed upon competing bidders. The Trustee defended this provision on the grounds that requiring identical competing bids would assist the Trustee in determining the highest and best bid.

14. On August 26, 2002, Court entered its Order granting Trustee's Motion For An Order Establishing Bidding And Other Procedures In Connection With Sale Of The Estate Free And Clear Of Liens And Other Interests (the "Bidding Procedure Order"). In the Bidding Procedures Order, the Court concluded that the Trustee failed to present sound business reasons why the Court should not allow bids as proposed by Park and that identical bids were not required for the Trustee to make a determination as to which bid is the highest and best bid to recommend to the Court for approval. The Bidding Procedures Order approved other bidding procedures as presented.

15. In addition to other procedures, the Bidding Procedures Order established a bid submission deadline of September 12, 2002 and in the event of at least one qualified bid, the

Trustee would conduct an auction at 10:00 a.m. on September 16, 2002. The Bidding Procedure Order further approved the proposed procedure that "[a]t the Auction, all qualified bidders shall be given the opportunity to revise and submit increased Bids so long as the increased Bid or Bids is at least $50,000 higher than the then existing highest or better Bid. Such bidding shall continue until the Trustee concludes the Auction, which the Trustee may elect to do at anytime if no increased Bid has been submitted to the Trustee or his designee within thirty (30) minutes from the submission of the last increased Bid." Finally, the Bidding Procedure Order provided for the final hearing on the Sale Motion.

16. Pursuant to the terms of the Bidding Procedure Order, the Trustee provided notice of the auction and the final hearing on the Sale Motion to all creditors of the Gulf States Steel estate, as well as known competing bidders for the Steel Mill Assets, all entities claiming a lien or other interest in the Steel Mill Assets, state and federal environmental authorities, and all parties requesting special notice and published such notice in the national edition of the Wall Street Journal once a week for two weeks prior to the auction.

17. On September 12, 2002, Park timely submitted its bid in the amount of $5,250,000 (the "Park Bid") in conformance with the procedures set forth in the Bidding Procedures Order. No competing bid was submitted by Palini e Bertoli.

18. The Park Bid is substantially similar to the GSRG bid except for the proposed increased sale price as required pursuant to the Bidding Procedures Order and provisions which permit Park to purchase less property of the estate

than GSRG proposed to purchase as expressly permitted by the Bidding Procedures Order.

19. As there was at least one qualified Overbid for the property (Park), pursuant to the Bidding Procedures Order, an auction was held at the debtor's plant site on September 16, 2002.

20. The Trustee received twenty-two cash bids with the last all-cash bid being that of Park in the amount of $6.3 million.

21. GSRG then tendered a bid purporting to be in the amount of $7 million dollars. The bid went on state the "amounts required by Ableco in order to pay Ableco in full and to comply with the terms of the Court's order on the Motion to Amend Compensation Agreement between the Trustee and Ableco will be paid in cash at closing, and the balance of the Purchase Price shall be offset (credited) from the allowed secured claim held by GSRG, to the extent allowed by Title 11 U.S.C. § 363(k)." The bid did not specify a monetary figure to pay Ableco in full and meet the requirements of the Order on the amended compensation agreement between the Trustee and Ableco. The bid did not include any authorization of a credit bid by the Indenture Trustee, the holder of the mortgage which benefits bondholders, of whom GSRG represents approximately 15% ($30 million of the total $190 million).

22. Park objected to this bid as being too indefinite for Park to respond, as not being an all-cash bid as contemplated by the Bidding Procedures Order, and as proposing an off-set or credit in violation and in contravention of the priority

provisions of the Bankruptcy Code. Due to several claims with higher priority than the bondholders, Park objected stating § 363(k) does not authorize an offset as proposed in the GSRG bid.

23. The Trustee rejected the GSRG Credit Bid on the grounds that it was not an all-cash offer, the dollar amount of the cash component of the bid was unclear, and the Trustee did not feel that he had the authority to determine whether GSRG had the right to credit bid or the value of that credit bid. The Trustee extended the time within which GSRG could submit an unqualified cash bid in excess of that of Park.

24. After being given several opportunities to tender an unqualified cash bid in excess of the last bid received from Park in the amount of $6.3 million, GSRG declined to submit any further unqualified cash bid.

25. Park asserted on the record that had GSRG submitted a further unqualified cash bid, it was ready, willing, and able to continue with the bidding process on a cash bid basis.

26. At the final hearing on the Sale Motion the Trustee reported that he proposed to accept the unqualified cash bid of Park in the amount of $6,300,000 as the highest bid received at the auction which conformed with the Bidding Procedures Order, and the best bid using his best business judgment.

27. On September 11, 2002, the City of Gadsden delivered to the Trustee a letter dated September 9, 2002 (the "City Letter"), objecting to the alterations made to the bidding

procedures by the Court as a result of the August 21, 2002, hearing and reflected in the Bidding Procedure Order. Trustee's Exhibit A. The City Letter was delivered to each of the potential competing bidders on September 11, 2002. The City Letter was never filed with the Court. The Trustee presented the City Letter at the final hearing on the Sale Motion as an additional, unfiled objection to the Sale Motion.

28. On September 12, 2002, certain bondholders some of whom established GSRG (the "Objecting Bondholders") filed an objection and brief in opposition to a sale to any bidder other than GSRG. The Objecting Bondholders assert that the limitations of § 365(f), the *Dewsnup* decision, and the takings clause of the Fifth Amendment compel the conclusion that the Objecting Bondholders (and presumably all other bondholders receiving benefits from the Secured Mortgage Notes, along with all lienholders) must affirmatively consent to any sale of the Steel Mill Assets that does not pay their claims in full.

29. The Bondholders hold only a portion of the bonds secured by the Steel Mill Assets and the Indenture Trustee of the bond issue has not objected to the Sale Motion or the Sale Order. The Objecting Bondholders have no authority to speak for all the bondholders. The secured mortgage notes which benefit the bondholders are controlled by State Street Bank and Trust Company, as the Indenture Trustee.

30. On September 13, 2002, the United Steel Workers of America filed a pleading urging the Court to consider factors other than the sales price in determining the highest and best bid. Such factors would include impact upon the community, the creation of jobs and environmental concerns.

31. At the final hearing on the Sale Motion, GSRG filed a "Motion For Order Compelling Trustee To Accept Bid of Gulf States Reorganization Group, Inc." (the "GSRG Motion to Compel") and an "Objection of Gulf States Reorganization Group, Inc. To Consideration of Bid by Gadsden Industrial Park, LLC And Motion to Disallow the Same" (the "GSRG Disallowance Motion").

32. In the GSRG Disallowance Motion, GSRG asserts that Gadsden Industrial Park, LLC failed to comply in numerous ways with the Bidding Procedures Order. Among other things, GSRG alleges that the modified purchase and sale agreement tendered by Gadsden Industrial Park, LLC (the "Modified Contract"):

> A. Added a paragraph allowing Gadsden Industrial Park, LLC to take title to less than all of the Steel Mill Assets (the Court notes that this paragraph is entirely consistent with the changes made to the bidding procedures as a result of the August 21, 2002, hearing and reflected in the Bidding Procedures Order);
>
> B. In its letter to the Trustee accompanying the Modified Contract, Gadsden Industrial Park, LLC states that the language in the Modified Contract that the sale be "free and clear of all liens, claims, encumbrances and other interests" includes any claim of any governmental agency even though no language to this effect is included in the Modified Contract;

C. In its letter to the Trustee, Gadsden Industrial Park, LLC states that its bid is conditioned upon "such other conditions as Gadsden or the Bankruptcy Court may determine are necessary to close the Transaction" including specific conditions precedent such as obtaining all necessary governmental and third party consents and approvals; and

D. Increased the time for the purchaser to close the transaction from 60 days after entry of an order approving the sale to at least 70 days thereafter.[1]

33. GSRG argued that the Park bid must be rejected outright because of these and other reasons, or approval of the bid must be deferred pending further proceedings of the Court.

34. At the final hearing on the Sale Motion, ICON Receivables 1988-A, Inc. (ICON) restated its limited objection with respect to the sale of a Mesta Roll Grinder ("Mesta Grinder") in which ICON asserts an uncontested purchase-money security interest. Ableco acknowledged ICON's first priority position with respect to that equipment,

1. GSRG also speculated, with the benefit of no admissible evidence, that the Gadsden Industrial Park, LLC bid is financialy backed by Nucor Corporation in an attempt to preempt any additional competition in the hot rolled steel market dominated by Nucor. GSRG further asserts that Nucor has a clear monopoly position on hot rolled sheet steel in the Southeastern United States. In the absence of any evidence to support GSRG's assertion, and with no opportunity or forum for Nucor to defend against these antitrust allegations, the Court sees no basis to entertain GSRG's assertions that any sale to Gadsden Industrial Park, LLC would violate applicable antitrust laws.

and Park acknowledged that equipment does not constitute any part of the Steel Mill Assets it proposes to purchase.

35. Park is a good faith purchaser pursuant to 11 U.S.C. § 363(m); and Park is not a successor in interest to the debtor or the Trustee.

36. Notice of the Sale Motion and the final hearing thereon was appropriate under the circumstances.

37. The sale of the Steel Mill Assets in the manner set forth herein will maximize the sale proceeds to be received by the debtor's estate in connection with the sale of the Steel Mill Assets and is in the best interests of the debtor's estate and creditors of the estate.

Conclusions of Law

Pursuant to 11 U.S.C. § 363(f) the trustee may sell property of the estate "free and clear of any interest in such property of an entity other than the estate, only if-(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; ... (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(b), (f). Since the five conditions listed in 11 U.S.C. § 363(f) are phrased in the disjunctive, property may be sold free and clear of interests if any one of the five conditions is satisfied. *In re WBQ Partnership*, 189 B.R. 97 (Bankr.E.D.Va.1995).

Appendix C

The Trustee seeks permission to sell the property free and clear pursuant to § 363(f)(2), (4) and (f)(5). As stated above, (f)(2) allows a sale free and clear if the lienholder or interest holder consents to the sale. Ableco, the first priority lienholder has consented to the Sale Motion. The Trustee may therefore sell the Steel Mill Assets free and clear of this lien under § 363(f)(2).

Likewise, the Revenue Commissioner, as agent for the State of Alabama and Etowah County submitted a pleading consenting to the Sale Motion on the condition that the liens of such taxing authority attach to the proceeds of sale. (Doc. No. 1413).

The Preferred Trade Vendors are deemed to have consented to the Sale Motion (actively supported by Ableco) by virtue of the provisions of the Preferred Trade Vendor Order (the Preferred Trade Vendors may not "contest, object to or otherwise dispute the valuation of collateral subject to the Trade Collection Lien, or any other action that holders of senior liens may take with respect to such collateral . . ."). The Trustee may therefore sell the Steel Mill Assets free and clear of this lien under § 363(f)(2).

Bankruptcy Code Section 363(f)(4) allows a sale to proceed free and clear of any interest if the interest is in bona fide dispute. The purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the estate "so that liquidation of the estate's assets need not be delayed while such disputes are being litigated." *In re Clark*, 266 B.R. 163, 171 (9th Cir. BAP 2001)(citing 3 Lawrence P. King, *Collier on Bankruptcy* ¶ 363.06 (15th ed. rev.1998)).

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The trustee bears the burden of showing that a bona fide dispute exists. *See In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 828 (N.D.Ill.1993) (citing *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr.N.D.Ill.1991)). Property may be sold free and clear of a lien when the dispute involves third parties. *In re Gerwer*, 898 F.2d 730, 733 (9th Cir.1990) (bona fide dispute need not be between the debtor or trustee and lienholder, but rather, if the outcome of dispute over interest will affect value of estate, statutory language is sufficient to embrace interest).

The term "bona fide dispute" is not defined in the Bankruptcy Code. *See In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr.N.D.Ill.1991); *In re Taylor*, 198 B.R. 142, 162 (Bankr.D.S.C.1996); *In re Collins*, 180 B.R. 447, 452 (Bankr.E.D.Va.1995). However, this term is used both is § 363(f)(4) and § 303(b). 11 U.S.C. §§ 303 and 363. Courts interpreting § 363(f)(4) have consistently held that for a bona fide dispute to exist the court must determine "whether there is an objective basis for either a factual or legal dispute as to the validity of the debt." *In re Octagon Roofing*, 123 B.R. at 590; *In re Bedford Square Associates*, 247 B.R. 140, 145 (Bankr.E.D.Pa.2000) (although the debtor had not commenced a strong-arm proceeding to avoid a provision from a shopping mall lease, the fact that it could was sufficient to establish a "bona fide dispute"); *In re Olympia Holding Corp.*, 129 B.R. 679, 681 (Bankr.M.D.Fla.1991); *Collins*, 180 B.R. at 452 (there must be "an objective basis for either a factual or legal dispute as to the validity of the debt"); *Taylor*, 198 B.R. at 162.

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Additionally, courts interpreting the term "bona fide dispute" as it applies to § 303(b) have consistently held that a "bona fide dispute" exists when "there is an objective basis for either a factual or a legal dispute as to the validity of debt." *In re Busick*, 831 F.2d 745, 750 (7th Cir.1987). *See also In re Atlas Machine & Iron Works v. Bethlehem Steel*, 986 F.2d 709 (4th Cir.1993) (bona fide dispute exists where there is a meritorious existing conflict as to creditor's right to payment); *Atwood*, 124 B.R. at 407 (bona fide dispute exists if "there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts."); *In re Leach*, 92 B.R. 483, 487 (Bankr.D.Kan.1988) (same); *In re Ramm Industries, Inc.*, 83 B.R. 815, 823 (Bankr.M.D.Fla.1988) (same).

While courts require evidence that shows that there is an "objective basis" for the dispute, the court is not required to determine the underlying dispute or determine the probable outcome, rather only that a dispute does in fact exist. *See Octagon Roofing*, 123 B.R. at 590; *Taylor*, 198 B.R. at 162; *Collins*, 180 B.R. at 452.

As stated in the Findings of Fact above, a valid legal and factual dispute exists as to any taxes owed based upon the filed objections to the assessed values of the Property. Accordingly, pursuant to 11 U.S.C. § 363(f)(4) this sale will be allowed to proceed pursuant to the Sale Motion over any objection by any Taxing Authority.

Section 365(f)(5) provides that the Trustee may sell the Property free and clear of any interest if the holder of that

interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f)(5); *see, In re P.K.R. Convalescent Centers, Inc.*, 189 B.R. 90 (Bankr.E.D.Va.1995) (allowing the sale of nursing home assets under § 363(f)(5) over objection where interest was reducible to a claim and subject to a hypothetical money satisfaction). By its express terms, Section 363(f)(5) permits a sale free and clear "if the trustee can demonstrate the existence of another legal mechanism by which a lien could be extinguished without full satisfaction of the secured debt." *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 829 (N.D.Ill.1993) (finding that Section 1129(b)(2) cram down is such a provision in Chapter 11).

Some courts that have addressed Section 363(f)(5) overlap their discussions with the provisions of Section 363(f)(3). *See AG Van Metre, supra; In re Canonigo*, 276 B.R. 257 (Bankr.N.D.Cal.2002); *In re Beker Industries Corp.*, 63 B.R. 474 (Bankr.S.D.N.Y.1986). However, "Section 363(f)(5) would repeat Section 363(f)(3) if it were interpreted merely to require a specific amount of money that the trustee could pay in order to sell the property free and clear of a lien." *Terrace Chalet*, 159 B.R. at 829. Cases requiring full payment under Section 363(f)(5) are "obsolete, inasmuch as [they are] inconsistent with the bankruptcy code." *In re Grand Slam, U.S.A., Inc.*, 178 B.R. 460, 462 (E.D.Mich.1995); *Healthco Int'l*, 174 B.R. at 176 (since any lien can be discharged by full payment of the underlying debt pursuant to § 363(f)(3), it makes no sense that § 363(f)(5) requires full payment); *Terrace Chalet*, 159 B.R. at 829 (decisions which require full payment of liens absent a showing of equitable consideration renders § 363(f)(3) superfluous).

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Section 363(f)(5) does not require that the sale price for the Property must exceed the value of the interests, but rather, only that the mechanism exists to address extinguishing the lien or interest without paying such interest in full. *Grand Slam*, 178 B.R. at 463. The phrase "could be compelled" only requires "that the interest in question be subject to final satisfaction on a hypothetical basis, not that there be an actual payment in satisfaction of the interest from the proceeds of the sale in question." *Healthco Int'l*, 174 B.R. at 176. Even if an actual payment were required, the lienholder would only be entitled to receive what it would receive in the event of a cram-down. Here, due to the size and nature of the Ableco lien, the indubitable equivalent as required in 11 U.S.C. § 1129(b)(2)(A)(iii) would be nothing. Like "cram downs" in Chapter 11 cases, "Section 724(b) compels lien creditors in appropriate cases to accept a money satisfaction of their interests by the payment of less than the full amount of the debt." *Grand Slam*, 178 B.R. at 463.

In this case, each of the claims, liens or interests identified in the Sale Motion could be compelled to accept a money satisfaction in a cram down plan of reorganization in a Chapter 11 case. Moreover, the DIP Financing Orders provide that Ableco has a lien on the Property that is senior in priority to such claims, liens or interests. Thus, the holders thereof would be compelled as a matter of law to release the same in a judicial or non-judicial foreclosure of the senior liens held by Ableco. *See* Ala.Code § 35-10-5.

In addition, with respect to the claims of the Taxing Authorities, Bankruptcy Code Section 724 dictates that the Taxing Authorities can be compelled to accept a money

satisfaction of their interest. Like the cram down provision in § 1129(b)(2), "[s]ection 724(b) compels lien creditors in appropriate cases to accept a money satisfaction of their interests by the payment of less than the full amount of the debt." *Grand Slam*, 178 B.R. at 463-4. *See also Healthco Int'l*, 174 B.R. at 177 (Section 724(b) allows the court to compel a taxing authority to accept "money satisfaction" of its tax lien by payment of less than the full amount of tax debt, such that property could be sold free and clear of the taxing authority's tax lien); *In re A.G. Van Metre, Jr., Inc.*, 155 B.R. 118 (Bankr.E.D.Va.1993), *aff'd without opinion*, 16 F.3d 414 (4th Cir.1994) (full satisfaction of a statutory tax lien against property was not required as a condition to the approval of a Chapter 7 trustee's sale of the property free and clear of all liens).

The foregoing is consistent with the sale free and clear ordered by this Court in connection with the prior Section 363 sales of the beam mill and the many assets offered at public auction in May, 2001.

The Bondholders objections on Fifth Amendment and *Dewsnup* grounds are due to be overruled.[2] In *Dewsnup v.*

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2. There is some question as to whether the Court should even consider the objections of the bondholders. These are not objections by secured creditors concerning sale of their collateral. Considering the nature of their claims, these objections may not even be objections of creditors, much less secured creditors. The objecting bondholders acknowledge in their Motion that the Indenture Trustee is the holder of the mortgage, and that they are mere holders of beneficial interests arising out of the rights of the Indenture Trustee. These bondholders

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Timm, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), the debtors were the owners of farmland encumbered by a deed of trust securing a debt that was far in excess of the value of the property. The debtors defaulted and, before the holder of the deed of trust could foreclose, filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code. This initial petition was dismissed and the debtors later filed for relief under Chapter 7 of the Bankruptcy Code. The debtors sought to have the bankruptcy court, pursuant to § 506(a), value the property at its fair market value which was substantially less than the amount owed to the secured creditor. This amount reflected a steep decline in the general market value of farmland in that area. In conjunction with § 506(a), the debtors also sought to use § 506(d) to "strip down" the secured creditor's lien by reducing the amount of the debt secured by the lien to the judicially determined value of the property. The intended effect to the lien holder was that, if the lien could be "stripped down" to the judicially determined value, the secured creditor would lose the benefit of any "appraisal error" in the judicially determined value as well as any subsequent market increase in the value of the property in any subsequent foreclosure action. Thus, if the lien were effectively "stripped down" to the judicially determined value, then any amount of the subsequent sales

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(Cont'd)

have no direct claim or enforceable interest in this case. Only the Indenture Trustee has standing to assert these objections on behalf of the bondholders and the Indenture Trustee has made no appearance in opposition to the sale. As such, the objection by the bondholders could be deemed as merely a statement as to their recommendation to whom the Trustee should approve. Nevertheless, the Court addresses the objections in order to fully consider all perspectives.

price that exceeded the judicially determined value would be distributed to the debtor or the other unsecured creditors instead of the secured creditor.

The Court in *Dewsnup* hinted that a possible Fifth Amendment violation may exist if it allowed the lien stripping due to the "post-stripping" appreciation of collateral. It stated that:

> [t]he practical effect of petitioner's argument is to freeze the creditor's secured interest at the judicially determined valuation. By this approach, the creditor would lose the benefit of any increase in the value of the property by the time of the foreclosure sale. The increase would accrue to the benefit of the debtor, a result some of the parties would describe as a windfall.
>
> We think, however, that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee. . . . any increase over the judicially determined valuation during bankruptcy rightfully accrues to the benefit of the creditor and not to the benefit of other unsecured creditors whose claims have been allowed and who had nothing to do with the mortgagor-mortgagee bargain.

Dewsnup v. Timm, 502 U.S. 410, 417, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Thus, the *Dewsnup* court avoided a potential Fifth Amendment problem by interpreting § 506(d) as not authorizing "lien stripping." While expressly limiting

its opinion to the facts before it[3], the Supreme Court in *Dewsnup* held that § 506(d) voids liens on the basis of whether the underlying claim is allowed or disallowed under § 502. *Dewsnup v. Timm*, 502 U.S. 410, 415-7, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992); see also 4 Collier On Bankruptcy ¶ 506.06[1][a] (Lawrence P. King ed., 15th ed. rev.1998) (this interpretation makes a great deal of sense because it is consistent with the legislative history, it is consistent with the exceptions set forth in § 506(d)(1) and (2), and it allowed the Court to avoid a potential Fifth Amendment problem).

As Justice Scalia indicates in his dissent, the *Dewsnup* court reached its conclusion by a questionable construction of § 506(d). The Court determined that § 506(d) does not void liens on the basis of whether they are secured under § 506(a), but rather on the basis of whether the underlying claim is allowed or disallowed under § 502.

The *Dewsnup* majority based its textual analysis on two premises. First, it explained that § 506(a) is not a definitional section and therefore, the words "allowed secured claim" do not have to mean the same thing in § 506(d) as they do in § 506(a). 502 U.S. at 417, 112 S.Ct. 773. Second, the court explains that the legislative history of § 506(d) indicates that its purpose was to permit liens to pass through bankruptcy unaffected. 502 U.S. at 418, 112 S.Ct. 773.

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3. "Hypothetical applications that come to mind and those advanced at oral argument illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day." 502 U.S. at 416-417, 112 S.Ct. 773.

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Section 506(a) is based upon a "priority" concept of security. Under the "priority" concept of security, "security" means a right not to a specific piece of collateral, but simply a right to be paid first to the extent of the value of the collateral. *See* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L.Rev. 97, 113-4 (1984) ("The secured creditor's ultimate remedy is to sell the asset and thereby realize the asset's value in the marketplace ... This definition of the secured creditor's remedy suggest that the probability of repayment and not any intrinsic interest in the collateral itself is the principal element of the value of his bargain with the debtor."); Charles A. Shanor, *A New Deal For Secured Creditors In Bankruptcy*, 28 EMORY L.J. 587, 595 n. 39 (1979) ("The Code's focus on the value of the secured party's claim rather than on the security itself is a substantial change from both the Act and the U.C.C.").

The Bondholders support their argument that the Steel Mill Assets may not be sold without their express consent by citing the opinion of Justice Brandeis in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935). The Frazier-Lemke statute which *Radford* held unconstitutional contained a peculiarity. The statute created a uniform five year plan of reorganization for farm loans in default, reducing the lien and payment on that lien to the appraised fair market value of the farm. By its terms the statute and its standard plan were strictly limited to liens in existence as of the effective date of the statute. Justice Brandeis had no problem holding that Congress could *not*

impair liens in existence as of the effective date of the passage of lien modification legislation without violating the Fifth Amendment. Justice Brandeis held that "[b]ecause the act is retroactive, in terms, and, as here applied, purports to take away rights of the mortgagee in specific property, [the Fifth Amendment] is controlling." *Id.* at 589, 55 S.Ct. 854. Since § 363(f) is not retroactive in its application, *Radford* is not applicable.

Furthermore, *Radford* has been seriously eroded if not overruled by *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 (1937) (holding that the second Frazer-Lemke Act, which was almost identical to the Act invalidated in *Radford*, was constitutional); *see also Helvering v. Griffiths*, 318 U.S. 371, 401 n. 52, 63 S.Ct. 636, 87 L.Ed. 843 (1943) (stating that the Supreme Court reexamined and corrected the "error" of *Radford* by its holding in *Vinton Branch*); *In re A.V.B.I., Inc.*, 143 B.R. 738, 746 (Bankr.C.D.Cal.1992) (noting that *Radford* had fallen into disrepute and was of doubtful continued vitality). Cases discussing *Radford* correctly explain that lien avoidance under the federal bankruptcy power does not come within the traditional definitions of taking under the Fifth Amendment. *In re Pillow*, 8 B.R. 404, 411 (Bankr.D.Utah 1981) (holding that § 522(f), bankruptcy code section governing avoidance of liens on property, does not violate the takings clause of the Fifth Amendment). The Fifth Amendment protects a creditor's rights only to the extent of its interest in the collateral as that interest is defined by the bankruptcy laws. *Travelers Ins. Co. v. Bullington*, 878 F.2d 354, 359 (11th Cir.1989) (holding that § 506 application to reduce under-secured creditor's allowed claim to value of

collateral for purposes of § 1225(a)(5) withstands Fifth Amendment challenge).

In applying § 363, the bankruptcy courts determine whether the property interests of third parties are adequately protected through consent or compensation. *See Ultimate Sportsbar, Inc. v. United States*, 48 Fed.Cl. 540 (2001); Bankruptcy Reform Act of 1978, S. Rep. 95-595, at 49-57 (1978), reprinted in 1978 U.S.C.A.A.N. 5787, 5835-43. The concept of adequate protection is derived from the fifth amendment protection of property interest as enunciated by the Supreme Court. *See Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 61 S.Ct. 196, 85 L.Ed. 184 (1940); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935).

Holding that the avoidance of a lien under § 506(d) would violate the Fifth amendment pursuant to due process or takings grounds would "call into question the entire history of lien avoidance in bankruptcy as well as the entire framework of the Code. The fact that due process and lien avoidance have coexisted since the Sixteenth Century, with the momentary aberration of Radford, requires the conclusion that [§ 506(d)] does not offend the [Fifth Amendment.]" *In re Yi*, 219 B.R. 394 (E.D.Va.1998), citing *In re Pillow*, 8 B.R. 404, 424 (Bankr.D.Utah 1981).

As the Seventh Circuit has held, "not every prospective diminution in the rights of creditors can be an unconstitutional taking; for such a conclusion would come close to nullifying the Constitution's bankruptcy clause." *In re Thompson*, 867 F.2d 416, 422 (7th Cir.1989). Clearly,

in conducting any analysis of the Fifth Amendment takings clause as applied to the Bankruptcy Code, consideration must be given to the bankruptcy clause contained in Article I, section 8 of the Constitution.

Thus, a sale free and clear of interests under § 363(f)(5) can be reconciled with the Supreme Court's opinion in *Dewsnup*, especially under the facts in this case. First and foremost, the *Dewsnup* majority went out of its way to make clear that the holding was limited to the facts before it. See Footnote 2 supra. Given that the Court was concerned that its holding not be applied even to other issues arising under § 506(a) or (d), it seems clear that the holding should not be exported to sales under § 363(f)(5).

Second, even though *Dewsnup* is still binding precedent, it has not received much acclaim. In fact, it has almost been universally criticized by the commentators. *See* A.W. Bailey III, *Dewsnup v. Timm: Judicial Sleight of Hand in Statutory Construction of the Bankruptcy Code*, 319 BYU Journal of Public Law (1993); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: a Study in the Supreme Court's Bankruptcy Cases*, 47 Syracuse Law Review 1 (1996); and Walter A. Effross, *Grammarians at the Gate: the Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 Seton Hall Law Review 1636 (1993). Needless to say, with as much criticism as *Dewsnup* has garnered, this Court would be unwilling to expand it beyond its narrow scope.

Third, the gravest concern expressed by the *Dewsnup* Court was the fact that the interpretation of § 506(d) that

would authorize lien stripping would lead to situations where the collateral of secured creditors would be taken away from the secured creditor and redistributed to the debtor or unsecured creditors. In a § 363 sale of collateral, however, that does not occur. There is no judicial determination of value, there is no judicial reduction in the value of the lien or the extent to which the lien attaches to the collateral. Instead, the value is determined by the marketplace, the collateral is reduced to cash proceeds (in most cases), and the lien attaches to the proceeds to the same extent and with the same priority that the lien attached to the collateral. There simply is no economic impairment to the holder of an undercollateralized lien as a result of a § 363 sale of the collateral and there is no taking of any economic property from the secured creditor that could possibly support a constitutional taking claim.

Fourth, the lien stripping prohibited by *Dewsnup* has no corollary in bankruptcy or non-bankruptcy law. To the contrary, the minor alterations of the rights of secured creditors effected by § 363(f)(5) can only be accomplished if the same thing could happen to the secured creditor under established bankruptcy or non-bankruptcy law ("such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."). How could an undersecured creditor claim an unlawful taking if the creditor were paid the same thing in a foreclosure sale by a senior secured creditor or under a plan of reorganization? Clearly, this limitation and the other aspects of a § 363(f)(5) sale of collateral provide a secured creditor with adequate protection of its interests and substantive and procedural due process.

Fifth, even if a secured creditor were to assert that § 363 affects an unconstitutional taking of property without due process of law, such an assertion ignores the due process rights embodied in the Bankruptcy Code in general and in § 363 in particular. A secured creditor is accorded procedural due process by the notice and hearing provisions of the Bankruptcy Code applicable to § 363, as well as rights of appeal, etc. As discussed above, substantively, the secured creditor is entitled to a replacement lien upon the proceeds of the collateral. Any secured creditor asserting such a claim would have to explain why the battle-tested concepts of notice, opportunity for a hearing, and adequate protection in the form of replacement liens, does not provide ample due process for any such imagined taking.

Lastly, the process embodied in § 363 of removing liens from one form of collateral and granting replacement liens in another form of economically equivalent collateral is much closer to the universally accepted practice of providing secured creditors with adequate protection for the use, sale or lease of collateral by the trustee on the condition that the trustee provide the affected secured creditor with adequate protection of its interest in the collateral, than it is to the lien stripping prohibited in the *Dewsnup* case. If the *Dewsnup* prohibition on lien stripping were to be inappropriately expanded beyond the facts of the *Dewsnup* case and extended to § 363 sales on the theory that such a sale strips the undersecured creditor of its lien (of course, ignoring the replacement lien on the proceeds of the collateral), that same theory would dictate that authorizing the trustee to use cash collateral upon the condition that the secured creditor be provided with a replacement lien on economically equivalent

collateral would also constitute lien stripping prohibited by *Dewsnup*. Such a theory and result is patently absurd[4].

The court's ruling is supported by the case of *In re Tanner*, 217 F.3d 1357 (11th Cir.2000) in which the Eleventh Circuit Court of Appeals joined with a majority of circuits in holding that a wholly unsecured home mortgage could be "stripped off" pursuant to a Chapter 13. Likewise, in *In re Paschen*, 296 F.3d 1203 (11th Cir.2002), the Eleventh Circuit Court of Appeals ruled that 11 U.S.C. § 1322(c)(2) permits Chapter 13 debtors to bifurcate undersecured short-term mortgages into secured and unsecured claims and "cramdown" the unsecured portion of the claim under 11 U.S.C. § 1325(a)(5).

The Court notes that the objection of the City of Gadsden goes to matters which were resolved pursuant to the Bidding Procedures Order. Because the City has not filed its objection or any other response to the Bidding Procedures Order within ten days after the entry of the Bidding Procedures Order, the matters raised in the City Letter are moot and the Bidding Procedures Order constitutes the law of the case.

Further, the Court notes that no party has moved the Court to reconsider the rulings made in the Bidding Procedures Order, nor, to the Court's knowledge has any party commenced an appeal with respect to the same. Except for

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4. In his dissent, even Justice Scalia branded the notion of the *Dewsnup* holding adversely affecting the ability of the trustee to sell property under § 363 free and clear of liens as being absurd, both at the beginning of his paragraph addressing this issue as well as at the end of such paragraph. 502 U.S. at 426-427, 112 S.Ct. 773.

the limited change to permit competing bids to be substantially similar to the GSRG Agreement as opposed to identical, the bidding procedures drafted by Ableco and GSRG were approved.

To conclude, the Trustee has complied with the applicable provisions of § 363(f) and, with no *Dewsnup* limitation, the Trustee may therefore sell the Steel Mill Assets free and clear of liens and other interests under § 363(f).

Having established that § 363(f) authorizes the sale free and clear of the liens and other interests in such property, the Court now turns to the issue of whether the Trustee should be authorized by this Court to do so.

The Second Circuit established the leading authority for approving a sale in *Equity Sec. Holders v. Lionel Corp. (In re Lionel)*, 722 F.2d 1063 (2nd Cir.1983). In *Lionel*, the Circuit held the proper standard to use when considering a proposed motion to sell is the business judgment test. It is this standard which has been adopted by the vast majority of courts. *See also, U.S. ex rel. Rahman v. Oncology Associates, P.C.*, 269 B.R. 139 (D.Md.2001) (The standard to be applied by a court in determining whether or not to approve the disposition of property is whether the Trustee exercised sound business judgment.) Under this standard, the Trustee has the burden to establish sound business reasons for the terms of the proposed sale. Factors for the Court to consider in whether to approve the sale include: (1) any improper or bad faith motive, (2) price is fair and the negotiations or bidding occurred at arm's length, (3) adequate procedure, including proper exposure to the market and accurate and reasonable

notice to all parties in interest. The Trustee is responsible for the administration of the estate and his or her judgment on the sale and the procedure for the sale is entitled to respect and deference from the Court, so long as the burden of giving sound business reasons is met. *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr.E.D.N.Y.1998) (noting discretion accorded to trustee with regard to sale of assets).

The business judgment of the Trustee must be evaluated: (a) as to the propriety of the Sale Motion and the bid of GSRG embodied within the Sale Motion, (b) as to the preparation for and conduct of the auction, and (c) as to the Trustee's determination of the highest and best bid received.

The Court finds that the Trustee's decision to sell the Steel Mill Assets was sound given the fact that this is a Chapter 7 case and given the prior unsuccessful marketing of the Steel Mill Assets both by public auction in May of 2001 (at which time reserve prices were not met for these particular assets), and by informal sales efforts involving steel industry participants and bidders aware of the Steel Mill Assets as a result of the marketing in connection with the May, 2001, public auction.

The Court finds that the Trustee's initial decision to sell the Steel Mill Assets to GSRG for the amount of $5 million was sound given the unsuccessful prior marketing efforts referred to immediately above, and given that the $5 million purchase price was roughly equivalent to the percentage of appraised value that was realized for the many assets that did sell in the May, 2001, public auction.

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The Court finds that the Trustee complied with the notice and advertising procedures specified by the Court in the Bidding Procedures Order. The property was properly exposed to the marketplace thereby allowing maximization of interest in bidding on the assets.

The Court further finds that there was no collusion or bad faith motive on the part of the Trustee or any bidder in connection with the Sale Motion, and that all negotiations and bidding occurred at arms-length. The Court did note in the Bidding Procedures Order the close interconnection between Ableco, Gulf States Steel, and GSRG, but no party has suggested any collusion.

The auction was conducted as contemplated in the Bidding Procedures Order. Parties were allowed to submit initial bids with accompanying contracts, which were substantially similar to the contract with GSRG. At the auction, competing bids were made by two bidders, GSRG and Park.

GSRG, as stated in the findings of fact, objected to the qualifying bid of Park for a variety of reasons. The Court finds these objections are without merit. Park submitted its bid in conformance with the Sale Motion, the Bidding Procedures Order, and the bidding procedures prescribed therein. GSRG's objection to Park's qualified bid on the basis that Park's modified contract allowed them to exclude certain property the Trustee sought to sell is a red herring. The Court notes that this right was agreed to at the bidding procedures hearing. This understanding was included in the Bidding Procedures Order wherein this Court held "As clarification

of such Bidding Procedures, the successful bidder may chose to take title to less than all of the Steel Mill Assets, without deduction from the price." Bidding Procedures Order ¶ 3. Thus, this objection is without merit.

Further, GSRG was not being required to take title to all of the debtor's remaining assets. They had already elected to "pick and choose" which property they wanted to keep and which property they wanted to leave to the trustee to be abandoned. Any requirement that any other bidder must take the same property as determined by GSRG defies logic. As GSRG could make an independent analysis of which property it desired, other parties could, and did, make their own determination. As long as the purchase price was not diminished by the selection, it was in the best interests of the estate to allow the potential bidders to determine to their own satisfaction which property they sought to purchase.

As for the other alleged deficiencies argued by GSRG to the Park bid, the Court points out these issues were not contained in the actual modified contract, but instead were mentioned in the letter to the Trustee accompanying the modified contract. See Trustee's Exhibit B. Even if the terms were in the modified contract, the Court finds the changes either de minimis, as with respect to the closing day from 60 to 70 days, or vague, as with respect to the mention of conditions of the Bankruptcy Court. As such, the Objection of Gulf States Reorganization Group, Inc. to Consideration of Bid by Gadsden Industrial Park, LLC, and Motion to Disallow the Same is overruled and denied. Additionally, the determination of what constituted a qualifying bid was left to the sound discretion of the Trustee. Like the Court, the

Trustee rejected these arguments by GSRG and this Court finds no abuse of discretion.

This takes us to the final issue to be determined by the Court, whether the Trustee exercised sound business judgment in the selection of the highest and best bid for the Steel Mill Assets. This determination is complicated by the various protests that have arisen out of the auction process and the fact that the Trustee was presented with the non-conforming GSRG Credit Bid.

The City of Gadsden, the Objecting Bondholders, the United Steel Workers of America and GSRG all urge that the Trustee and the Court look to factors other than benefit to the estate in determining the highest and best bid. They believe that factors such as the number of jobs created in the local community as a result of a given bid, the effect on the community of a given bid, environmental issues presented by the different bids, and the preferences of the local government of one bidder over another should be considered by the Court and the Trustee in addition to the purchase price and the benefit to the estate of one bid versus another.

The United Steel Workers of America cite cases in support of the above proposition. However, these cases, by and large, involve instances where courts have authorized the acceptance of the lower of competing bids because the lower bid provides greater benefit to the estate than the higher bid. *See In re Bakalis, supra; In re After Six, Inc.*, 154 B.R. 876 (E.D.Pa.1993) (Court ordered highest dollar amount bid accepted despite committee's preference for a lower amount bid that included a promise to employ debtors' former employees).

Appendix C

Despite the concerns of City of Gadsden, the Objecting Bondholders, the United Steel Workers of America and GSRG, the Court reminds the parties, that the Trustee, not the Court, is selling this property. As stated in 11 U.S.C. § 704, one of the duties of the trustee is to "collect and reduce to money the property of the estate. . . ." "In enacting the Bankruptcy Code, Congress expressed its specific intent that judges of the United States Bankruptcy Court should not participate in the administration of bankruptcy estates." *In re Landscape Properties, Inc.*, 100 B.R. 445, 447 (Bankr.E.D.Ark.1988); *In re NEPSCO, Inc.*, 36 B.R. 25 (Bankr.D.Me.1983). As stated above, the Trustee has "great judicial deference" in deciding which bid to accept as the best and highest bid. *Bakalis*, 220 B.R. at 532. Even though the discretion is not without limit, a Court should not step in and assume a role and responsibility properly placed in the hands of the trustee.

As between the two bidders, Park and GSRG, the Bidding Procedures Order required overbids "at least $50,000 higher than the then existing highest or better Bid." The nonconforming bid by GSRG prevented the Trustee from determining if the bid exceeded the prior bid by $50,000, as required in the Bidding Procedures Order. Such a determination required facts not available to the Trustee, including the final amount of debt owed to Ableco and the full amount payable to the Trustee for commission and professional fees.

Furthermore, the non-conforming bid relied on an inapplicable statute. Since several claims have a higher priority than the claims held by GSRG, any application of

an offset by § 363(k) would violate those priorities. In addition to paying Ableco in full, the claims of taxing authorities would have to be paid in full, along with the liens of the Preferred Trade Vendors, in the approximate amount of $7.5 million, before any proceeds could be applied to the mortgage debt.

Finally, as stated earlier, neither GSRG nor the Objecting Bondholders can act for the bondholders as a whole. Both these entities control only a portion of the bondholders. The Indenture Trustee is the record holder of the mortgage, and it did not join this specious proposal.

This leaves the $6.3 million bid of Park and a lower bid of GSRG. Between these bids, the Trustee chose the $6.3 million bid of Park. Obviously, this is the higher bid, allowing the best return for the estate. The United Steel Workers of America argue the Court, and presumably the Trustee, should not look at just the highest bid. This argument is made even after citing *In re Gil-Bern Indus., Inc.*, 526 F.2d 627 (1st Cir.1975) which held a trustee's duty is to maximize the return to a bankruptcy estate. *See also In re Bakalis*, 220 B.R. 525 (Bankr.E.D.N.Y.1998). The First Circuit, as does this Court, acknowledged that the "highest bid is not always the best bid." *Gil-Bern* at 629. However, this is not a situation where the higher bid has complications which might render it not the best bid. For example, in most respects the Park bid is almost identical to the GSRG bid, with respect to the benefit to the estate. The Park bid contains no contingencies which might render it less desirable to the estate than the GSRG bid. The Park bid will not take substantially longer to consummate than the GSRG bid. Thus, from an estate point

of view, the Court can find no abuse of discretion with the trustee's decision to accept the Park bid over the GSRG bid. Finally, most of the cases cited by the Steelworkers Union did not involve a court forcing a trustee or a debtor-in-possession to take a lower bid. *In re After Six Inc.*, 154 B.R. 876 (Bankr.E.D.Pa.1993) (court sustained debtor's decision to go with higher offer); *In re Bakalis*, 220 B.R. 525 (Bankr.E.D.N.Y.1998) (court sustained trustee's decision to go with lower bid). As held in *In re Landscape Properties, Inc.*, 100 B.R. 445 (Bankr.E.D.Ark.1988):

> In deciding whether to approve a purchase offer or in choosing which is the better offer when competing offers have been made, courts generally consider factors in addition to a higher dollar amount. It has been held, however, that in a liquidation case it is "legally essential" to approve the highest offer, although this statement assumes that the offers and offerors are in all other respects comparable.

Id. at 447 (citing *In re Flannery*, 11 B.R. 974, 977 (Bankr.E.D. Pa.1981)).

Here, from the perspective of the estate, these offers and offerors are in all respects comparable. As such, the Trustee's decision to accept the higher and better bid of Park is consistent with sound business judgment, and is due to be approved. *See Equity Sec. Holders v. Lionel Corp. (In re Lionel)*, 722 F.2d 1063 (2nd Cir.1983).

Appendix C

ORDER

For the foregoing reasons, it is by the Court hereby

ORDERED, ADJUDGED AND DECREED:

1. That the Sale Motion is due to be, and is hereby, **GRANTED**.

2. That the bid of Gadsden Industrial Park, L.L.C. for the Steel Mill Assets is the highest and best bid received by the Trustee; and the trustee's proposed sale of the Steel Mill Assets to Gadsden Industrial Park, L.L.C. free and clear of all liens, claims and other interests as specified in the Sale Motion and the Bidding Procedures Order for $6,300,000 is due to be, and is hereby, **APPROVED**.

3. The Trustee is hereby **AUTHORIZED, ORDERED, and DIRECTED** to consummate and close the sale of the Steel Mill Assets to Gadsden Industrial Park, L.L.C. pursuant to the Sale Motion and Bidding Procedures Order free and clear of all liens, claims and other interests as specified in the Sale Motion and the Bidding Procedures Order for $6,300,000.

4. Park is a good faith purchaser pursuant to 11 U.S.C. § 363(m); and Park is not a successor in interest to the debtor or the Trustee.

5. As specifically provided in the Bidding Procedures Order, Gadsden Industrial Park, L.L.C. may in its sole discretion elect, at any time prior to the consummation and

closing of the sale of the Steel Mill Assets, to exclude any portion of the Steel Mill Assets from the sale and shall not be required to purchase any such excluded items; provided, however, that the purchase price shall remain fixed at $6,300,000 and shall not be adjusted in response to any such election to exclude any items from the sale at or before closing.

6. That except for the objection of ICON with respect to the Mesta Grinder which objection is **SUSTAINED**, all other objections to the Sale Motion are due to be, and are hereby, **OVERRULED**.

7. That Trustee's decision to accept the bid of Gadsden Industrial Park, LLC for the Steel Mill Assets is the highest and best bid received by the Trustee was appropriate under the circumstances and meets the "Business Judgment" standard.

8. Nothing in this Order releases or nullifies any liability to a governmental entity under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the date of entry of this Order. This Order is not intended to prohibit any environmental protection agency from enforcing its regulations in and to any purchaser for future compliance.

9. Further, there appear to be two Uniform Commercial Code UCC-1 forms filed with a lien upon certain property as identified at the Bidding Procedures hearing. The Trustee, at the hearing, stated that said liens had not been addressed specifically and therefore this Court concludes that this sale

must be conducted subject to those particular creditor's rights to the collateral.

10. The Clerk is hereby directed to post a copy of this Order on the Clerk's website at www.alnb.uscourts.gov (click on National Interest Cases) pursuant to the General Order previously entered in this case.

11. A copy of this order shall be sent to each of the following (which shall be sufficient service and notice hereof): all parties in interest, and all parties listed on the sign-in sheet for the September 16, 2002 hearing.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 17, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15976-II

GULF STATES REORGANIZATION GROUP, INC.,

Plaintiff-Appellant,

versus

NUCOR CORPORATION,
CASEY EQUIPMENT CORPORATION,
GADSDEN INDUSTRIAL PARK, LLC,

Defendants-Appellees.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON, BARKETT and CUDAHY*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the

* The Honorable Richard Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

Appendix D

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E — RELEVANT STATUTES

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

Appendix E

15 U.S.C. § 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

(2)

No. 06-1383

FILED
MAY 4 - 2007
CLERK

In The

Supreme Court of the United States

NUCOR CORPORATION,
CASEY EQUIPMENT CORPORATION, and
GADSDEN INDUSTRIAL PARK, LLC,

Petitioners,

v.

GULF STATES REORGANIZATION GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the standards recently enunciated by this Court under the Sherman Act for "predatory bidding" are pertinent in any way to a case asserting an entirely different type of antitrust action, involving conduct by a monopolist which was carried out with the intent and effect of blocking a new entrant to the relevant market.

2. Whether the Court of Appeals' holding – that a prospective new competitor which was excluded by a monopolist from the relevant market had standing to sue under the Sherman Act, and suffered antitrust injury – was consistent with existing Supreme Court and other Circuit Court precedent.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption sets forth all the parties to this case.

The respondent corporation has no parent company. No publicly held company owns ten percent or more of respondent's stock.

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JURISDICTION

The opinion and judgment of the court of appeals was entered on October 5, 2006, and a timely petition for panel rehearing and rehearing en banc was denied January 17, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an antitrust action, asserting concerted action in restraint of trade in violation of Section 1 of the Sherman Act, and monopolization, attempted monopolization and conspiracy to monopolize in violation of Section 2 of the Sherman Act.

The relevant product market asserted by the plaintiff is "hot rolled coil," a form of thin steel used in various types of manufacturing. The relevant geographical market is the Southeastern United States. Petitioners' Appendix, at 1a-2a (hereafter, Pet. App. ___).

The principal defendant, Nucor Corporation ("Nucor"), is the dominant producer of hot rolled coil in the Southeastern United States. Pet. App. 2a.

The plaintiff, Gulf States Steel Reorganization Group, Inc. ("the Group"), was formed by a number of steel industry executives for the purpose of buying out of bankruptcy and reopening the steel mill operated by the former Gulf States Steel, Inc. of Alabama ("Gulf States Steel"). The primary product that the Group planned to manufacture was hot rolled coil, in direct competition with Nucor. Pet. App. 2a.

Both Gulf States Steel itself and the company's bankruptcy trustee engaged in extensive efforts to sell its assets, without success. Thereafter, the trustee entered into a contract to sell Gulf States Steel's land and primary steel-producing equipment to the Group, subject to bankruptcy court approval. Pet. App. 2a.

Upon reading of the impending sale in the trade press, Nucor's Executive Vice President contacted a steel industry equipment dealer, co-defendant Casey Equipment Corporation ("Casey"). A contract was formed pursuant to which an entity formed by Casey, Gadsden Industrial Park, LLC ("Park"), would buy the steel-producing assets at issue with money provided by Nucor. Nucor had a unilateral right to reject any resale by Casey to a domestic buyer, but a more limited right with respect to foreign ones. Pet. App. 3a.

Nucor's affiliate (Park), with Nucor's money, succeeded in outbidding the Group at the bankruptcy auction that Nucor's intervention triggered, and later re-sold the assets at a profit to buyers located in Asia. Pet. App. 3a.

The fundamental dispute between the parties before the trial court was the relevant market in which to evaluate the impact of the actions of Nucor and its affiliates. Nucor posited that the proper market in which to evaluate its conduct was not the relevant market asserted in plaintiff's Complaint (production of hot rolled coil), but rather a purported market for steel mill assets.[1] Nucor's

[1] Although the case was resolved by the District Court on a motion for summary judgment, that motion was in reality a rehearing of the issues raised in defendants' Motion to Dismiss. The only discovery to date has concerned the threshold issues of standing and antitrust injury.

fundamental argument – which the District Court accepted and the Court of Appeals overruled – was that Nucor's intervention increased competition *at the bankruptcy auction.*

When this case is evaluated in the context of the market for hot rolled coil, the effect on competition is readily apparent. Without Gulf States, Nucor's only competition in the Southeastern United States was a single steel mill in Kentucky. The Group's plans raised the specter of a low-cost hot rolled coil producer in Nucor's back yard.

The Court of Appeals, after evaluating the facts presented in the context of the market for hot rolled coil, reversed the trial court's grant of summary judgment in favor of Nucor and its affiliates, holding that the Group had standing to sue, and had properly asserted antitrust injury.

ARGUMENTS FOR DENYING THE PETITION

I. THE ISSUES RAISED IN THIS MATTER HAVE NO RESEMBLANCE TO THOSE RAISED IN THE *WEYERHAEUSER* CASE

As Judge Cudahy noted in his concurring opinion below, "[t]his case is about suppression of potential competition by a monopolist – the very essence of anti-competitive conduct." Pet. App. 14a. In evaluating the case in the context of competition in the market for production of hot rolled coil, it becomes readily apparent that in arranging for the purchase and re-sale overseas of the steel-producing equipment that the Group needed to enter the market, Nucor received something that had far more

value to it than merely the profit on the sale: the ability to continue to operate free of effective competition in the Southeastern United States. Professor Areeda referred to that intangible as constituting an "anticompetitive premium" – the value of forestalling competition that results from an acquisition by a dominant firm. *See* Areeda, Hovenkamp and Solow, IV (Rev. Ed.) Antitrust Law, at § 952b, p. 251.

The primary basis for Nucor's assertion that a writ of certiorari should issue in this case is its contention that the issues raised are similar to those decided in this Court's recent decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007). There is simply no substance to that contention. *Weyerhaeuser* involved allegations of "predatory bidding," – a rare phenomenon involving exercise of monopsony power to bid up the price of manufacturing inputs in order to put those inputs beyond the reach of competitors in the buying market. Predatory bidding, much like predatory (below cost) pricing, creates a particularly challenging problem for the judiciary. The case law in this area implicitly recognizes that any scheme that has as its object the destruction of competitors can constitute a Sherman Act violation. The challenge involving cases where liability rests on alleged anticompetitive pricing is to set the proof requirements high enough so as to penalize anticompetitive conduct while at the same time not discouraging vigorous price competition on the merits. This Court accomplished just that in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) with respect to predatory pricing, and established similarly stringent proof requirements with respect to predatory bidding in *Weyerhaeuser*.

Predatory bidding was not alleged by the plaintiff in this matter, and the antitrust principles applicable to this case are far removed from those decided in *Weyerhaeuser.*

Counsel for Nucor has cobbled together an argument that posits steel mill equipment auctions as an "upstream" market to the production of steel itself. From this shaky foundation – there being absolutely nothing in the record of this case establishing the existence of an "upstream / downstream" relationship between bankruptcy auctions and steel production – Nucor argues that competition at bankruptcy auctions[2] will be enhanced by denying excluded competitors relief under the antitrust laws. This is nothing more than a re-hash of the argument rejected by the Court of Appeals that this case should be analyzed in the context of the market for steel mill assets, instead of the market for production of hot rolled coil. *See* Pet. App. 11a, where the Court of Appeals overrules the District Court's finding that there was full and fair competition at the bankruptcy auction, noting that in cases alleging an anticompetitive asset acquisition, the propriety of the acquisition is measured by the impact on the relevant market, not the level of competition for the acquisition.

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[2] While antitrust issues are relatively rare in bankruptcy cases, neither the Justice Department not the Federal Trade Commission have hesitated to assert their jurisdiction over the parties to a bankruptcy auction in appropriate situations. *See, e.g., United States v. Sungard Data Systems,* 172 F. Supp.2d 172, 178-79 (D.D.C. 2001); *In re First Data Corporation,* 1994 FTC Lexis 149 (1994); *Winn Dixie Stores,* 66 Federal Register 3602 (January 16, 2001) (Proposed FTC Consent Order involving purchase of bankruptcy assets). *See also,* Spears, Federal Merger Enforcement in Bankruptcy, *Antitrust* (ABA, Spring 1992, at 19).

When the case is analyzed in its proper context, it becomes readily apparent that there is no conflict between the Court of Appeals' decision and this Court's decision in *Weyerhaeuser.*

II. THE COURT OF APPEALS' OPINION IS FULLY CONSISTENT WITH WELL-ESTABLISHED PRECEDENT ON STANDING AND ANTITRUST INJURY

By taking certain statements in the Court of Appeals' opinion out of context, and by parsing isolated words and phrases used in the Opinion as if they were statutes subject to interpretation, Nucor and its co-petitioners assert conflicts with established Supreme Court precedent, and conflicts among the Circuits, that are more imaginary than real.

First, Nucor erroneously contends that the Court of Appeals limited its analysis of the causation issue to only Article III standing, and ignored the more stringent test applicable to standing under § 4 of the Clayton Act. All of Nucor's legal arguments are founded on this erroneous premise. There is simply no substance to this contention. At part II.A of the Court of Appeals' opinion, after reviewing plaintiff's contentions, the court notes that "[t]hese assertions state a clear causal connection between the plaintiff's injury and the defendants' conduct." Pet. App. 5a. While it is true that later on in that same paragraph the Opinion states that "it is clear that the Group would have purchased the assets *but for* the Appellees' participation in the auction," even further on, at footnote 6 (Pet. App. 12a), the Opinion states that "we have held that the Group has shown *proximate cause.*" It is abundantly clear from the context of these statements that the essence of the

Court of Appeals' holding was that the Group had established adequate causation *by any standard.* Nucor is incorrect in its assertion that the Court of Appeals used the wrong standard.

Likewise, Nucor seizes on a statement in the panel opinion's closing remarks dealing with the antitrust injury issue, where it notes that "here the Appellees' [Nucor and its affiliates'] conduct did not *increase* competition in the relevant market." (Pet. App. 12a). The reference to "increased competition" was an obvious rejoinder to Nucor's argument that Nucor's affiliate's bid at the bankruptcy auction had increased competition in the market for steel mill assets. The point made by this section of the Opinion is that it was the effect of Nucor's conduct *on the market for steel production,* not competition at the auction, that mattered for purposes of antitrust analysis.

When the Court of Appeals' opinion is read as a whole, there is no question that the holdings with respect to standing and antitrust injury are fully consistent with this Court's and other Circuit Courts' precedent.[3] Hence there is no basis for this Court to assert its jurisdiction pursuant to Supreme Court Rule 10.

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[3] For example, at page 23 of Nucor's petition, the argument is made that the Court of Appeals "distinguished" (hence did not follow) this Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977). In fact, the Court of Appeals starts out its analysis of that issue with a discussion of *Brunswick,* then goes on to explain that when this case is analyzed in the context of the proper relevant market, there was readily apparent antitrust injury.

CONCLUSION

For the foregoing reasons, respondent Gulf States Steel Reorganization Group, Inc. respectfully requests that the Court deny the petition of Nucor Corporation and its affiliates for a writ of certiorari.

Respectfully submitted,

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FILED
MAY 14 2007
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SUPREME COURT, U.S.

No. 06-1383

IN THE

Supreme Court of the United States

NUCOR CORPORATION,
CASEY EQUIPMENT CORPORATION and
GADSDEN INDUSTRIAL PARK, LLC,

Petitioners,

v.

GULF STATES REORGANIZATION GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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LIST OF PARTIES

Petitioners' list of parties was set forth at page *ii* of their Petition for Writ of Certiorari, and there were no amendments to that statement.

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for Writ of Certiorari, and there were no amendments to that statement.

RESPONDENT'S OPPOSITION ONLY CONFIRMS THE NEED FOR CERTIORARI

Respondent's Brief in Opposition ("BIO") simply reiterates the Eleventh Circuit's misconstructions of federal antitrust law and, in so doing, reemphasizes the need for a grant of certiorari to set those errors aside.

First, Respondent seeks unsuccessfully to distinguish this Court's recent decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007). Recognizing, as the District Court confirmed on a full factual record, that neither "[p]redatory bidding" nor any other exclusionary conduct in the bankruptcy auction could be established, Respondent reiterates the Eleventh Circuit's conclusion that Respondent's consequential alleged inability to enter the hot rolled coil market still suffices to sustain a Sherman Act § 2 violation. BIO 2, 5. In Respondent's view, *Weyerhaeuser* has significance only where predatory bidding is alleged. *Id.* This contention misstates the Court's analysis in *Weyerhaeuser* and is completely at odds with the rationale of a series of decisions, including *Weyerhaeuser*, which have elucidated the proper basis of liability in Sherman Act § 2 cases.

The plaintiff in *Weyerhaeuser* claimed that Weyerhaeuser drove it out of the lumber business by bidding up input costs and making it economically impossible for plaintiff to acquire the alder logs it needed to stay in business. Had this Court accepted the interpretation of Sherman Act § 2 espoused by Respondent and the Eleventh Circuit, it would have been required to sustain the decision below because plaintiff was clearly excluded from the downstream lumber market by defendant's actions. Instead, this Court reversed because the conduct of Weyerhaeuser giving rise to plaintiff's exclusion, while undoubtedly injurious to plaintiff, could not be shown to be anticompetitive. 127 S. Ct. at 1077-78. In so doing, the

Court adhered to a continuing line of authority recognizing that the proper Sherman Act § 2 analysis focuses on both the existence of market power and the means used to achieve or preserve that power. In those decisions, the Court has made clear that the antitrust laws were not designed to hamstring pro-competitive actions by dominant market participants even if those actions were adverse to the interests of their business rivals. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004).

The only means by which Respondent alleges that Petitioners excluded Respondent from the hot rolled coil market was lawful, admittedly non-predatory bidding for dormant steel mill assets in a Chapter 7 bankruptcy auction. As with input purchasing in *Weyerhaeuser*, such bidding is the "very essence of competition," 127 S. Ct. at 1077 (quoting *Brooke Group Ltd.*, 509 U.S. at 226), as well as a vital element of the Chapter 7 bankruptcy process. It should be condemned only if demonstrably conducted in a predatory manner – *i.e.*, in a manner that can only be explained by the benefit of foreclosing a potential rival's access to the inputs necessary to compete.[1] Here the record, as carefully evaluated

---

[1] Respondent's claim that the antitrust enforcement authorities "assert their jurisdiction over the parties to a bankruptcy auction in appropriate situations," BIO 5, n.2, is premised solely on merger enforcement involving the acquisition of assets from a Chapter 11 debtor in possession that remains a going concern. Respondent simply ignores the critical distinction between the Chapter 7 asset liquidation proceeding two years after shut down at issue here and a Chapter 11 reorganization. *See* Pet. 12-16. In any event, the issue is not whether activities in a Chapter 7 auction are somehow immune from antitrust scrutiny. Rather, the Court is asked to focus on the types of bankruptcy auction conduct necessary to sustain an allegation of Sherman Act § 2 liability.

by the District Court, undisputedly showed that Petitioners had ample pro-competitive reasons to participate in the bankruptcy auction and arbitrage the dormant assets into a more favorable foreign asset market. The teaching of *Weyerhaeuser* with respect to the evaluation of input purchasing by an alleged monopolist with the effect of excluding an actual or potential competitor from the market is clearly applicable to Petitioners' activities, thus requiring reversal or, at a minimum, a remand for further proceedings not inconsistent with *Weyerhaeuser*.

Second, Respondent seeks to avoid consideration of the Eleventh Circuit's confusion of "but for" and "proximate" causation by contending that the Eleventh Circuit found "causation *by any standard*." BIO 7. Respondent's only support for this proposition is that the Eleventh Circuit talismanically recited in a conclusory footnote that it had found "proximate cause." BIO 6; *see* App. 12a n.6. In fact, the Eleventh Circuit gave no consideration to the District Court's careful exposition of "superseding cause" as required by better reasoned antitrust precedent and this Court's decision in *Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 832 (1996). The only fair, and eminently reversible, reading of the Eleventh Circuit's decision is that it wrongly equated the more stringent "by reason of" requirement of Clayton Act § 4 with the minimal constitutional "but for" standing requirement of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[2] Such a precedent that should not be allowed to stand.

Third, Respondent essentially ignores the question of whether the injury it allegedly sustained by being

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[2] *See* App. 5a (applying minimal "causal connection" test for constitutional standing from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); 6a (acknowledging application of only the "general standing" and "causations-in-fact" requirements that apply to all plaintiffs in federal court, rather than the Clayton Act § 4 standard that governs private antitrust actions).

competitively ousted from a below-market acquisition opportunity can be deemed an "antitrust injury" under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Respondent simply claims that the alleged "effect of Nucor's conduct on the market for steel production" is all "that mattered for the purpose of antitrust analysis." BIO 7. Respondent, however, was never in "the market for steel production" either as a seller or buyer. Rather, Respondent's alleged injury arose only in the bidding process for dormant capital assets and, as the Petition established, in no way could be attributed to Nucor's alleged market power as opposed to Petitioners' accurate, procompetitive perception of arbitrage values. This Court should take the opportunity presented by this case to establish that "antitrust injury" can arise in Sherman Act § 2 cases only when a plaintiff is harmed by otherwise irrational business conduct attributable to a motive of attaining or protecting market power. Where, as here, the alleged injury arises from pro-competitive recognition of an opportunity to put dormant assets to their highest and best use,[3] the Court should clarify that it cannot qualify as "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp.*, 429 U.S. at 489.

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[3] The District Court allowed full discovery with respect to Petitioners' motivation for entering the bankruptcy auction and determined that "Nucor and Casey are guilty of nothing more than attempting to make a profit by buying low and selling high in the market for used capital assets." App. 51a.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, this Court should grant the Petition for writ of certiorari.

Respectfully submitted,

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